87-383

Supreme Court, U.S.
FILED
SEP 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FORT WAYNE MORTGAGE COMPANY,
Petitioner,

v.

JIMMY E. WOOD,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The United States Congress enacted 12 U.S.C.A. §1735f-7 (West 1980) to preempt restrictive state usury limits for FHA/VA home loans. Subsection (b) of this law gives states the ability to decline, or override, this federal preemption by changing their usury limits. The question presented is whether subsection (b) requires the legislation amending state usury limits to expressly refer to FHA/VA loans in order to effect an override of the FHA/VA preemption.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT[1]

1. Jimmy E. Wood and the members of the class certified by the United States District Court, Southern District of Georgia.
2. Fort Wayne Mortgage Company, a Michigan corporation and a wholly owned subsidiary of Colwell Mortgage Corporation, a Texas corporation.
3. Richard Doyle and the members of the class certified by the United States District Court, Southern District of Georgia.
4. Southern Guaranty Corporation, a Florida corporation.

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[1] The Government National Mortgage Association is a real party in interest in that it holds assignments to nearly all of the loans in the plaintiff class.

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OFFICIAL REPORTS OF OPINIONS BELOW

The first opinion of the United States Court of Appeals for the Eleventh Circuit, reported under the name *Doyle v. Southern Guaranty Corp.*, is found at 795 F.2d 907 (11th Cir. 1986). The second and final opinion of the Eleventh Circuit was issued on June 5, 1987 and has yet to be reported in any official or unofficial reporter. The opinion of the Supreme Court of Georgia on the certified question is reported in *Southern Guaranty Corp. v. Doyle*, 256 Ga. 790, 353 S.E.2d 510 (1987). The order of the United States District Court for the Southern District of Georgia denying Petitioner's motion to dismiss and motion for summary judgment is also unreported.

Copies of all four of the above opinions and orders are included in the Appendix to this Petition.

STATEMENT OF THE GROUNDS FOR JURISDICTION

The judgment sought to be reviewed was entered on June 5, 1987 by the United States Court of Appeals for the Eleventh Circuit.

The within Petition for Writ of Certiorari is presented within ninety (90) days pursuant to 28 U.S.C.A. §2101(c) (West 1982), and this Court's jurisdiction is invoked under 28 U.S.C.A. §1254(1) (West 1966).

STATUTES AND REGULATIONS INVOLVED

1. The FHA preemption statute enacted as §308 of the Housing and Community Development Amendments of 1979, Pub.L. No. 96-153, title III, §308, 93 Stat. 1113-14, (codified at 12 U.S.C.A. §1735f-7 (West 1980)):

> (a) The provisions of the constitution of any State expressly limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved by lenders and the provisions of any State law expressly limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received or reserved shall not apply to any loan, mortgage, or advance which is insured under subchapter I or II of this chapter.
>
> (b) The provisions of subsection (a) of this section shall apply to loans, mortgages, or advances made or executed in any State until the effective date (after December 21, 1979) of a provision of law of that State limiting the rate or amount of interest, discount points, or other charges on any such loan, mortgage, or advance.

2. The VA preemption statute enacted as §401 of the Veterans' Disability Compensation and Survivors' Benefits Amendments of 1979, Pub.L. No. 96-128, title IV, §401, 93 Stat. 982, 986-87 (codified at 38 U.S.C.A. §1828 (West Supp. 1987)):

> If, under any law of the United States, loans and mortgages insured under title I or title II of the National Housing Act are exempt from the application of the provisions of any State constitution or law (1) limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved by lenders, (2) restricting the manner of calculating

such interest (including prohibition of the charging of interest on interest), or (3) requiring a minimum amortization of principal, then loans guaranteed or insured under this chapter are also exempt from the application of such provisions.

3. The 1980 Amendments to Georgia's Motor Vehicle Sales Finance Act, Motor Vehicle Sales Finance Act Amended, 1980 Ga.L. 523 (codified at O.C.G.A. §10-1-33 (1982)), in pertinent part:

> Section 1. An Act known as the "Motor Vehicle Sales Finance Act," approved April 18, 1967 (Ga. Laws 1967, p. 674), as amended, is hereby amended by striking subsection (a) of Section 4 in its entirety and inserting in lieu thereof a new subsection (a) to read as follows:
>
> "(a) Notwithstanding the provisions of any other law, the finance charge, exclusive of insurance, and other benefits and official fees, shall not exceed the following rates:
>
> Class 1. Any new motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made and all vehicles not previously titled— $10 per $100 per year.
>
> . . .

STATEMENT OF THE CASE

A. Introduction.

Before the Court is an important question of federal preemption of state usury laws for federally backed loans. This question has potentially devastating implications for private lenders and the Government National Mortgage Association ("GNMA"). The United States Court of Appeals for the Eleventh Circuit has interpreted an admittedly ambiguous statute, 12 U.S.C.A. §1735f-7, in such a way that lenders relying in good faith on the availability of federal preemption of restrictive state usury laws are now faced with thousands of loans subject to state usury laws. The draconian penalties associated with state usury laws endanger the solvency of these lenders and raise the possibility that GNMA will ultimately bear the cost of these penalties.

B. Statement of Facts

On February 25, 1982, Jimmy E. Wood and Patricia A. Wood entered into a mobile home retail installment sales contract with Vintage Enterprises, Inc. d/b/a Colonial Mobile Homes, Inc. The contract was for the purchase of a new 1982 Vintage model mobile home. The contract was assigned by Vintage Enterprises, Inc. to Fort Wayne Mortgage Company, a Michigan corporation, which is a lender authorized by the VA to process VA loans for guaranty without prior approval. The amount financed on the contract was $22,400 at an annual percentage rate of 18.5%. The prescribed maximum finance charge for VA guaranteed transactions at the time of the Wood contract was 19%.

The form contract used in connection with this transaction specifies in the lower left hand corner of the front and back pages that it is a VA-FHA-GNMA contract. Plaintiff does not dispute that this is a VA guaranteed credit sale.

C. Proceedings Below

On November 13, 1984, Jimmy E. Wood, a Georgia resident, filed a class action complaint against Fort Wayne Mortgage Company in the United States District Court for the Southern District of Georgia. Plaintiff's complaint invoked the court's diversity jurisdiction under 28 U.S.C.A. §1332 (West Supp. 1987). Plaintiff alleged that the interest rate on his mobile home sales contract was usurious under the Georgia Motor Vehicle Sales Finance Act, O.C.G.A. §§10-1-30 to 38, and that the contract did not meet the requirements for federal preemption of state usury laws.

Mr. Wood seeks, on behalf of himself and the putative class members, a judgment declaring that Fort Wayne is barred from the recovery of any finance charges, delinquency charges or collection charges in connection with the mobile home contracts entered into with the named Plaintiff and the members of Plaintiff's class. Plaintiff also seeks recovery of an amount equal to double the time price differential (interest) charged in connection with each transaction due to the alleged willful nature of the purported violations. There are approximately eight hundred and sixty-two (862) contracts within the plaintiff class. Assuming that each transaction involves a finance charge of at least $20,000, Defendant faces a loss of finance charges totalling $17,240,000, plus a possible penalty of, at a minimum, $34,480,000.

Responding to the complaint, Fort Wayne moved to dismiss and for summary judgment on the grounds that Plaintiff's loan was guaranteed by the Veterans Administration ("VA") pursuant to 38 U.S.C.A. §1819 (West 1979 and Supp. 1987) and under 38 U.S.C.A. §1828 (West Supp. 1987) was therefore exempt from state usury laws.

On March 13, 1985, Judge Dudley H. Bowen, Jr. denied Fort Wayne's motion to dismiss and motion for summary judgment, stating simply that a ruling in favor of Fort Wayne would require the court to overrule its opinion in the case of *Doyle v. Southern Guaranty Corporation*, United States District Court for the Southern District of Georgia, Civil Action File No. CV-184-180 (January 15, 1985). In *Doyle*, a similar case involving an FHA mobile home installment sales contract, Judge Bowen had ruled that a mobile home lender seeking to avoid Georgia's usury limits must comply with the preemption requirements of the Depository Institutions Deregulations & Monetary Control Act of 1980, codified in Note following 12 U.S.C.A. §1735f-7 (West 1980 and Supp. 1987) ("DIDMCA") and could not rely on the preemption provisions for FHA insured loans found in 12 U.S.C.A. §1735f-7.

In his order denying Fort Wayne's motions, Judge Bowen, *sua sponte*, authorized Fort Wayne to petition for immediate appeal pursuant to 28 U.S.C.A. §1292(b) (West Supp. 1987). A petition for interlocutory appeal was filed on March 25, 1985, and was granted by the United States Court of Appeals for the Eleventh Circuit on April 29, 1985.

The Eleventh Circuit consolidated this case with *Doyle*, also on interlocutory appeal. On July 18, 1986,

the Eleventh Circuit issued an opinion in which it decided, in relevant part, that the VA and FHA preemption programs were separate from the DIDMCA preemption program, and that a loan qualifying under the VA or FHA preemption statutes need not also qualify under DIDMCA. The Court of Appeals then held, however, that the Wood loan could not qualify for VA preemption because the State of Georgia had overridden the VA preemption program when, in 1980, the state legislature amended the usury limit on motor vehicle financing, even though the state legislation contained no reference to the VA lending program. At the time of Plaintiff's purchase, mobile home loans were treated as motor vehicle loans. The Eleventh Circuit also certified a question of state law to the Supreme Court of Georgia—whether Georgia's 1983 abolition of interest rate limitations on mobile home loans greater than $3,000 should be applied retroactively to contracts entered into prior to the date of the amendment.

On March 12, 1987, the Supreme Court of Georgia issued its opinion and held that Georgia's 1983 removal of interest rate ceilings on certain mobile home loans did not apply retroactively. Thereafter, on June 5, 1987, the Eleventh Circuit entered its judgment affirming the ruling of the district court and remanding the case to the district court for further proceedings consistent with its decisions. This petition for certiorari follows.

ARGUMENT

I. LEGISLATIVE BACKGROUND

A. Introduction

In 1979, Congress passed the Veterans' Disability Compensation and Survivors' Benefits Amendments of 1979, Pub.L. No. 96-128, title IV, §401(a), 93 Stat. 982 (codified at 38 U.S.C.A. §1828 (West Supp. 1987)). A provision of this new law exempted Veterans Administration ("VA") guaranteed loans from existing state usury laws. Congress, however, preserved the states' rights to override the federal preemption if they changed their usury laws applicable to federally insured loans after the effective date of the new federal law. This case involves an interpretation of the statutory language allowing the state override. It arises in the context of a VA guaranteed loan for the purchase of a new mobile home. Before discussing the merits of why this writ of certiorari should be allowed, however, Petitioner respectfully submits that a review of the historical context in which this legislation was enacted will be helpful in understanding the issues at hand.

Toward the end of the 1970's, spiraling interest rates had driven the cost of credit up to record levels. Competition for housing credit was keen and a severe mortgage credit crunch developed. Compounding the problem were restrictive state statutes which set mortgage usury ceilings at rates below that which the creditors themselves were paying. Reacting to this credit squeeze, the flow of mortgage funds was diverted to those states which allowed more competitive interest rates. In addition, the maximum interest rate permitted by the FHA and VA for their mortgage

loan insurance and guaranty programs exceeded the rates allowed by certain states' usury laws. In those states, lenders were accordingly discouraged from making any FHA or VA loans. The scenario which resulted was one in which the distribution of available credit was unevenly spread across the nation, with housing credit in many states becoming almost unavailable. Repercussions were felt in every phase of the housing industry, frustrating national housing policies and programs.

Manufactured home financing was especially hard hit since the restrictive and ambiguous usury ceilings were more troublesome for manufactured housing lenders than for traditional housing lenders. One problem in particular was uncertainty over applicable usury limits for a residential manufactured home loan which, in many states, was treated differently than a residential real property loan. *See, Hearings Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 96th Cong., 1st Sess. (April 27, 1979). (statements by Harvey Weiner, Coordinating Council on Manufactured Housing Finance).

In response to this situation and to stabilize the home financing system, the federal government, among other things, removed state mortgage rate ceilings on federally insured loans. *See generally*, S.Rep. No. 368, 96th Cong., 1st Sess. 18-19 (1979), reprinted in 1980 U.S. Code Cong. and Ad. News 236, 254-55. Federal preemption of state usury laws served many national objectives. It stabilized the nation's mortgage market, facilitated a national housing policy, aided the functioning of a national secondary

market in mortgage lending, and helped assure the stability of the nation's financial system. *Id.*

B. The 1979 VA Usury Preemption, 38 U.S.C.A. §1828

The federal usury preemption for VA loans, for both traditional and manufactured homes, was signed into law on November 28, 1979. Veterans' Disability Compensation and Survivors' Benefits Amendments of 1979, Pub.L. 96-128, title IV, §401(a), 93 Stat. 982, 986 (codified at 38 U.S.C.A. §1828 (West Supp. 1987)). Under §1828, wherever loans insured by the Federal Housing Administration (FHA) under title I or title II of the National Housing Administration Act, 12 U.S.C.A. §§1701-1750g (West 1979 and Supp. 1987), are exempted from state usury laws under any federal law, VA loans are also exempt.

The Conference Report accompanying this legislation stresses the importance that Congress placed on the VA usury preemption as a means of achieving nationwide the goals of the VA mobile home loan program. Conference Report to the Veterans' Disability Compensation and Survivors' Benefits Amendments of 1979, 96th Cong., 1st Sess., 125 Cong. Rec. 32589, 32592 (daily ed. Nov. 15, 1979).

> Thus, the committee emphasizes that the purpose of this provision as modified is to assure, to the maximum extent possible in any jurisdiction in which FHA loans are exempt, that no veteran seeking to use his or her loan-guarantee entitlement, whether for a conventional home, mobile home, home improvement, or any other authorized purpose, shall be discouraged or prevented from such purpose by reason of a State antiusury pro-

> vision. Because one of the major purposes of the VA mobile home loan program is to assist Vietnam-era veterans to acquire homes, the committee strongly urges the VA to provide adequate and complete information concerning this provision to appropriate staff officials and to the financing community.

Id.

C. The 1979 FHA Usury Preemption, 12 U.S.C.A. §1735f-7

The VA exemption from state usury laws found at 38 U.S.C.A. §1828 is a derivative preemption statute which piggy backs the usury exemption available to FHA insured loans. Simply put, if the loan would be exempt from state usury laws as an FHA insured loan, it would also be exempt as a VA guaranteed loan. Congress' purpose in enacting the VA exemption in this manner was "to assure a coordinated Federal policy with regard to the application of State anti-usury provisions to FHA and VA home loans." Senate Report (Veterans' Affairs Committee) to Veterans' Disability Compensation and Survivors' Benefits Amendments of 1979, No. 260, 96th Cong., 1st Sess., reported in 1979 U.S. Code Cong. and Ad. News, p. 1894, 1915-1917.

The National Housing Act provides the relevant exemption from state usury laws for FHA insured loans (and thus preemption for VA guaranteed loans). This preemption, codified at 12 U.S.C.A. §1735f-7, provides as follows:

> (a) The provisions of the constitution of any State expressly limiting the rate or amount of interest, discount points, or other charges

> which may be charged, taken, received, or reserved by lenders and the provisions of any State law expressly limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received or reserved shall not apply to any loan, mortgage, or advance which is insured under subchapter I or II of this chapter [i.e., FHA loans].
>
> (b) The provisions of subsection (a) of this section shall apply to loans, mortgages, or advances made or executed in any State until the effective date (after December 21, 1979) of a provision of law of that State limiting the rate or amount of interest, discount points, or other charges on any such loan, mortgage, or advance.

12 U.S.C.A. §1735f-7 (West 1980).

Under subsection (b) of §1735f-7, a state could elect to override the FHA preemption if, after the effective date of §1735f-7, that state passed a law which limited the allowable interest rate on any FHA insured loan, mortgage or advance. In its section by section analysis of the Housing and Community Development Amendments, of which §1735f-7 is a part, the Senate's Report states that the FHA usury preemption "would not apply where a state subsequently reenacts a usury limit applying to FHA loans." S.Rep. No. 164, 96th Cong., 1st Sess. 33 (1979). The Report also provides that "[T]he section would allow States to reenact a usury limit applicable to FHA mortgages subsequent to enactment of this provision." *Id* at 22. The Report of the House Committee on Banking, Finance and Urban Affairs, H.R. Rep. No. 154, 96th

Cong. 1st Sess. 24, reported in 1979 U.S. Code Cong. and Ad. News 2317, 2340, notes that states could override the FHA preemption if they took subsequent action "to subject these FHA instruments to state usury ceilings." In short, as the above legislative history reveals, it was Congress' intent that states seeking to override the FHA preemption found in §1735f-7 had to specifically change the rates applicable to FHA loans.

II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN ITS INTERPRETATION OF THE OVERRIDE PROVISIONS OF THE FHA USURY PREEMPTION, 12 U.S.C.A. §1735f-7.

In the consolidated opinion entitled *Doyle v. Southern Guaranty Corporation*, 795 F.2d 907 (11th Cir. 1986), the Court of Appeals held that Georgia overrode the FHA and VA preemptions by amending its Motor Vehicle Sales Finance Act ("GMVSFA") in 1980 to raise the allowable interest limit on Class 1 "motor vehicle" retail installment contracts from eight percent (8%) to ten percent (10%) add-on. *Id.* at 912-914. The Court of Appeals expressly noted that the 1980 amendments to GMVSFA referred to neither "federally insured" loans nor the FHA/VA preemption statutes. *Id.* at 912. In its decision, the Court of Appeals interpreted §1735f-7(b), the subsection allowing state override, to not require such a reference.

The Court of Appeals conceded that there were two possible interpretations of the override language found in subsection (b) of the FHA preemption. Under the first, propounded by Petitioner Fort Wayne, the state law must refer specifically to federally insured loans

or loans insured by the FHA in order to override the preemption. Under the second, submitted by Plaintiff-Respondents, a state need only pass a statute limiting the amount of interest which could be charged. There are no case law decisions on this particular point, and the Court of Appeals could discern no clear direction from the legislative history. With no other guidance, the Court of Appeals rested its decision on the fact that another federal statute, DIDMCA, (codified in the Note following 12 U.S.C.A. §1735f-7 (West 1980 and Supp. 1987), contains a preemption provision which is clear in requiring specific language in state statutes seeking to override its preemption. Under the reasoning that Congress knew the type of language to use when it intended that state override provisions make specific reference to the federal preemption, the Court of Appeals concluded that the FHA preemption, which is not as clear as DIDMCA, did not require a specific reference to the federal preemption law in order for a state to effect an override.[2]

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[2] The Court of Appeals' decision in footnotes cites an opinion letter from Shirley Wiseman, General Deputy Assistant Secretary for Housing, clarifying HUD letter TI-352, December 16, 1983. *Doyle v. Southern Guaranty Corp., supra*, 795 F.2d at 912, n. 12 and 913, n. 16. In the second citation appearing in footnote 16, the opinion letter is read to support the Court of Appeals' conclusion that an override of federal preemption occurs when a state merely passes a law limiting the interest rate on manufactured home loans. It is Petitioner's view that, with respect to the override question, the Court of Appeals' reliance on the opinion letter is misplaced. The introductory paragraph of the letter states that it was written in response to a question on another issue. Ms. Wiseman's comments interpreting the override mechanism were gratuitous dicta and should be disregarded.

Petitioner respectfully submits that the opinion of the United States Court of Appeals is erroneous and that this important federal law question on the construction of the National Housing Act's preemption provisions should be resolved by this Court.

A. An Examination of the Language of §1735f-7, As a Whole, Reveals Congress' Intent That States Which Choose to Override the FHA Preemption Have to Specifically Refer to FHA or Federally Insured Loans in Their Override Legislation.

Careful review of the language of the FHA preemption, 12 U.S.C.A. §1735f-7, shows that Congress intended for states to expressly refer to federally insured or FHA loans in any legislation seeking to override the federal preemption. By its terms, §1735f-7 is separated into two subsections—(a) and (b). Subsection (a) preempts state usury limits only on loans "insured under subchapter I or II of this chapter," i.e., FHA loans. Subsection (b) then gives the states the opportunity to decline or override the preemption.

To determine whether subsection (b) requires states to explicitly refer to federally insured or FHA loans in their override legislation, the key question is: What is meant by the word "such" on the last line of subsection (b)? It is Petitioner's view that the "such" refers to FHA insured loans. Thus, the reader should mentally insert "FHA insured" where the word "such" appears. According to this view, subsection (b) requires states to expressly change their interest rates on FHA loans in order to achieve an override of subsection (a). The logic of the position is clearly shown from a careful analysis of the language employed by Congress.

For convenience of analysis only, subsection (b) of §1735f-7 will be divided into two subparts. Subsection (b), as so divided, follows:

> (i) The provisions of subsection (a) of this section shall apply to loans, mortgages, or advances made or executed in any State until
>
> (ii) the effective date (after December 21, 1979) of a provision of law of that State limiting the rate or amount of interest, discount points, or other charges on any *such* loan, mortgage, or advance.

12 U.S.C.A. §1735f-7(b) (subpart delineation (i) and (ii) added) (emphasis added).

The phrase "loan(s), mortgage(s), or advance(s)" is used twice in subsection (b): once in that part identified above as subpart (i), and once in that part identified above as subpart (ii). In subpart (i), the phrase "loans, mortgages, or advances" is necessarily modified by subsection (a) of §1735f-7 which limits the usury preemption to "any loan, mortgage, or advance *which is insured* under subchapter I or II of this chapter." (emphasis added). Failure to recognize this implicit modification would mean that subsection (b) of §1735f-7 would be applicable to *any* loan, mortgage, or advance. This is obviously incorrect. A reading of §1735f-7, as a whole, clearly shows that the "loans, mortgages, or advances" mentioned in subpart (i) of subsection (b) are limited to those to which subsection (a) applies.

The phrase "loan, mortgage, or advance" appears again in subpart (ii) of subsection (b), this time modified by the word "such." Under the common rules

of construction, the word "such" refers the reader to a previous modifier. At first glance, it is difficult to tell what modifier is intended. Upon closer examination, however, it is clear that the "such" must refer to the limitation in subsection (a) regarding "any loan, mortgage, or advance which is insured under subchapter I or II of this chapter." This is so because, as discussed above, the earlier reference in subpart (i) of subsection (b) to "loans, mortgages, or advances" is necessarily modified by the phrase "insured under subchapter I or II of this chapter." Thus, even if the "such" refers the reader to this earlier reference in subpart (i), the implicit modification of subsection (a) cannot be ignored. Accordingly, when Congress provided that a state could decline or override the preemption provided for FHA insured loans if that state passed a law "limiting the rate or amount of interest, discount points, or other charges on any such loan, mortgage, or advance," Congress meant for states to expressly refer to federally or FHA insured loans in their override legislation.

B. The Court of Appeals' Interpretation Creates Anomalous Results

The Court of Appeals interpreted the language of §1735f-7 to mean that any enactment or reenactment by a state of its usury limitations would effect an override of the federal preemption. The Court of Appeals indicated that there are no applicable qualifications on this override. All a state need do is enact an interest rate limitation or change its existing interest rate, whether up or down, and the override would automatically occur—regardless of whether the state intended it to occur. This holding creates the anomaly that even if a state intended to maintain the

federal preemption for federally insured loans, it could not enact or change an interest rate limitation without causing an override.

In Georgia, for example, home loans other than manufactured home loans are governed by O.C.G.A. §7-4-3 included in chapter 4 of title 7 of the Georgia Code concerning interest and usury. (Manufactured home loans, on the other hand, are generally governed by the Motor Vehicle Sales Finance Act, O.C.G.A. §§10-1-30 to 38.) Interestingly, at the time of the loan in question, §7-4-3 set a flexible maximum rate of interest for real estate loans but provided in subsection (c)(5) that: "Real estate loans, the repayment of which is guaranteed or insured by the United States or by any agency or instrumentality thereof, shall not be subject to any maximum rate of interest . . ." O.C.G.A. §7-4-3(c)(5).

The flexible interest rate set forth in §7-4-3, as it existed at the time of Plaintiff-Respondent's loan, had been enacted just nine months prior to the effective date of the FHA preemption. If §7-4-3 had been passed after the FHA preemption, then, under the decision of the Court of Appeals, it would have worked as an override of the FHA preemption even though subsection (c)(5) of §7-4-3 expressly indicated that Georgia did not intend an override. This means that any state which has enacted or changed the interest rate limitations since December 21, 1979, the effective date of U.S.C.A. §1735f-7, would not be entitled to the benefit of federal preemption for FHA or VA loans even if that state wanted to retain those benefits. It is unknown how many states have inadvertently triggered an override.

C. The Decision of the Court of Appeals, if Allowed to Stand, Would Have a Disastrous Impact on the FHA and VA Federally Insured Mortgage Programs.

In the event the Court of Appeals' decision is allowed to stand and the Petitioner's VA guaranteed loans are not preempt from Georgia state usury laws, similar individual and class actions will undoubtedly be filed in the Eleventh Circuit and nationwide.[3] Proliferation of these cases will jeopardize the viability of federal programs designed to provide housing assistance and impose significant economic hardships on the manufactured housing industry and its related mortgage finance markets.

In passing legislation authorizing a federal guaranty of securities backed by pools of mortgages insured or guaranteed by the FHA, Congress intended to stimulate private sector investments in federal housing programs. As a by product, FHA and VA loan programs have made homes available to thousands of veterans and other Americans who otherwise would not have been able to obtain mortgages. FHA and VA borrowers have also benefited from the more lib-

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[3] At present, the following class actions involving mobile home loans are pending in the Southern District of Georgia: *Doyle v. Southern Guaranty*, Civil Action File No. CV-184-180; *Wood v. Fort Wayne Mortgage Company*, Civil Action File No. CV-184-204; *Dinkins v. First Carolina Finance*, Civil Action File No. CV-185-241; *Goldson v. Colwell Mortgage Company*, Civil Action File No. CV-187-075; *Atkinson v. General Electric Credit Company*, Civil Action File No. CV-187-076; *James v. Green Tree Acceptance*, Civil Action File No. CV-187-070. Discovery documents in the *Doyle*, *Wood*, *Dinkins* and *Goldson* cases reflect that, in these four cases alone, there are over 9,226 loans in the putative classes.

eral down payment terms and consumer protections afforded by FHA and VA loans.

Congress achieved these results by creating the Government National Mortgage Association ("GNMA") mortgage backed securities program which developed a secondary market for mortgage loans. GNMA is a wholly owned government corporation within the United States Department of Housing and Urban Development ("HUD"). Through the mechanism of supplying a secondary market, GNMA creates and stimulates mortgage credit. This, in turn, supports the government's housing goals by helping to provide funds to that portion of the housing market for which conventional financing is not readily available. Security for capital investment in housing (manufactured and traditional) is provided by GNMA's guaranty of the timely payment of principal and interest for the securities which are backed by pools of FHA insured or VA guaranteed loans. In addition, the GNMA guaranty covers the loss the investor would suffer due to a mortgage default that exceeds the federal insurance or guaranty provided by FHA or VA. The GNMA guaranty is backed by the full faith and credit of the United States.

The GNMA program works in the following general manner. Approved lenders, in their capacity as issuers of GNMA securities, obtain commitments from GNMA to guarantee the securities backed by mortgage pools. Once this commitment is obtained, the GNMA guaranteed mortgage backed securities may then be sold to investors. In most cases, the issuers have solicited advance commitments from dealers, investment bankers, or investors to purchase specific amounts of the securities at a set price and yield. The issuing lenders

also service the underlying pool of mortgages by collecting monthly payments on the pooled mortgages and remitting this amount, less the service fee, to certificate holders.

The affidavit of Louis Gasper, the executive vice president of GNMA (which affidavit is included in the record in this case and in appendix "G" attached hereto) thoroughly explains that a finding of usury in the present case would have grave consequences for GNMA and for all of the federal programs benefitting from private sector investment in housing. Over ninety percent (90%) of all FHA insured and VA guaranteed manufactured home loans are placed in GNMA pools. Nearly 1.75 million federally insured or guaranteed manufactured home loans have been made because of the existence of the GNMA program, totalling approximately $4.7 billion in securities backed by manufactured home loans since the founding of the GNMA program. Gasper Affidavit at 5-6.

It is respectfully submitted that the Court should not underestimate the significance to GNMA and the federal government of the issues at hand. If a large number of FHA and VA manufactured home loans, which relied on the FHA and VA usury preemptions, were found to be outside those preemptions and thus usurious, the stability of GNMA and the other federal housing programs would be threatened. Lenders would be subjected to massive civil penalties which alone could bankrupt many mortgage banking lenders.

On an individual loan basis, a finding of usury could also render a loan ineligible to remain in its respective GNMA pool since the finding would most likely void the FHA insurance or VA guaranty. This would mean that the loan in question would no longer be eligible

to back GNMA securities. The GNMA securities issuer would thus be forced to buy out the ineligible loans from the pools by paying the securities holders the current outstanding principal balance of the loans from the issuer's own funds. This would be very likely to cause many issuer defaults and bankruptcies, forcing GNMA to step in and, with its own resources, backed by the full faith and credit of the United States, to make the investors whole and terminate the pools prematurely.

Currently, there are approximately $4.6 billion in GNMA manufactured home securities outstanding. *Id.* at 5. Obviously, not all of these loans rely on usury preemption. It is fair to assume, however, that a large percentage of them did, and those that did most likely relied on the FHA and VA preemptions. It is readily apparent that the issue at hand could have nationwide impact. The ramifications of the Court of Appeals' decision, if not reviewed and corrected, could produce serious harm to both GNMA and the entire federal housing program.

CONCLUSION

A careful reading of the FHA preemption statute, 12 U.S.C.A. §1735f-7, shows that it was Congress' intent that states seeking to override the FHA preemption would explicitly refer to FHA or federally insured loans in their override legislation. The statute's legislative history supports this interpretation. The construction of §1735f-7 adopted by the Eleventh Circuit is erroneous and will have grave consequences for GNMA and existing federal housing programs. For the reasons set forth in this petition, a writ of certiorari should be granted to review the judgment

and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-8187

RICHARD DOYLE,
Plaintiff-Appellee,

versus

SOUTHERN GUARANTY CORPORATION,
Defendant-Appellant.

No. 85-8297

JIMMY E. WOOD,
Plaintiff-Appellee,

versus

FORT WAYNE MORTGAGE CO.,
Defendant-Appellant,

Appeals from the United States District Court for the Southern District of Georgia

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(July 18, 1986)

Before RONEY and Clark, Circuit Judges, and FAIRCHILD*, Senior Circuit Judge.

RONEY, Circuit Judge:

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*Honorable Thomas E. Fairchild, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

Some federal statutes permit exemption from state usury laws if mobile home financing contracts afford protections to the consumer set forth in the federal laws. Not all the federal statutes require the same protection. These diversity jurisdiction usury cases present the question of whether FHA or VA-insured mobile home agreements, which provide the protections required by those separate Acts, are exempt from Georgia usury laws, even though the contracts do not contain the terms required by another federal exemption statute, section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA). DIDMCA was the statute dealt with in two recent *en banc* decisions. *Quiller v. Barclays American/Credit, Inc.*, 764 F.2d 1400 (11th Cir. 1985) *(en banc), cert. denied,* 54 U.S.L.W. 3762 (1986); *Grant v. General Electric Credit Corp.*, 764 F.2d 1404 (11th Cir. 1985) *(en banc), cert. denied,* 54 U.S.L.W. 3762 (1986).

This is a consolidated appeal of two cases, one involving an FHA-insured agreement,[1] the other a VA-insured agreement.[2] We make three decisions at this time and certify a controlling question of state law to the Supreme Court

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[1]Plaintiff in *Southern Guaranty Corp. v. Doyle* purchased a new mobile home from Family Homes Sales Center, Inc., d/b/a Eagle Homes Sales Center. Family Homes assigned the retail sales installment contract, dated January 25, 1983, to Southern Guaranty Corporation. The amount financed was $11,474.76, and the total finance charge over the contract's 15-year term was to be $17,507.04. The finance charge on plaintiff's contract exceeded the amount permitted under O.C.G.A. § 10-1-33 by $294.90. This contract was insured by the Federal Housing Authority.

[2]Plaintiff in *Fort Wayne Mortgage Co. v Wood* purchased his mobile home on February 25, 1982 from Vintage Enterprises, Inc., d/b/a Colonial Mobile Homes, Inc. Vintage Enterprises assigned the retail installment sales contract to Fort Wayne Mortgage Company. The contract has a 15-year term. The amount financed was $22,400.00 and the finance charge $43,987.60. This finance charge exceeded the amount permitted under O.C.G.A. § 10-1-33 by $10,387.60. This contract was insured by the Veterans Administration.

of Georgia. *First,* we hold that a lender who complies with the requirements of the FHA or VA preemption statutes, for loans guaranteed under those statutes, need not also comply with DIDMCA in order to exempt itself from state usury limits on mobile home retail installment contracts. *Second,* we hold that the State of Georgia overrode the FHA and VA preemptions when it amended its usury limit on mobile home transactions in 1980 and 1981, even though the amendments referred to neither the FHA/VA statutes nor to FHA/VA-insured loans. *Third,* we hold that the Georgia statute of limitations does not bar these suits.

We *certify* to the Supreme Court of Georgia one question: whether Georgia's 1983 abolition of interest ceilings on mobile home retail installment contracts of the dollar amounts involved here eliminated the cause of action for usury of those purchasers who entered their contracts prior to the amendments' effective date.

Under Georgia law, a lender who violates the finance charge limitations contained in the Georgia Motor Vehicle Sales Finance Act (GMVSFA) is barred from recovering *any* of the finance charge. O.C.G.A. § 10-1-38(b). A lender who willfully violates the statute is subject to an additional penalty of double the time-price differential. O.C.G.A. § 10-1-38(c). The finance charge on both contracts involved here exceeded the maximum rate of interest (10% add-on) then allowed under GMVSFA. O.C.G.A. § 10-1-30 *et seq.*

The cases came to us on a 28 U.S.C.A. § 1292(b) appeal of the legal questions decided by the district court in denying defendants' motions for dismissal for failure to state a cause of action and summary judgment.

The district court held that an FHA or VA-insured mobile home lender may not rely on the FHA or VA preemption statutes alone, but rather must also comply with the DIDMCA regulations in order to receive federal exemption from the state usury laws. On this point, we reverse the district court. The district court held that Georgia's 1983

amendments eliminating interest rate limits on mobile home retail sales installment contracts of $3000.00 or more apply prospectively only and did not affect the causes of action herein asserted. This point we certify to the Supreme Court of Georgia. The district court also ruled on class action and discovery issues which are inappropriate for us to decide.

A. FHA/VA Versus DIDMCA

The FHA and the VA preemption statutes were enacted at approximately the same time.[3] The VA statute received

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[3]The FHA preemption statute was enacted as section 308 of the Housing and Community Development Amendments of 1979, Pub. L. No. 96-153, 93 Stat. 1101, 1113-14, approved on December 21, 1979. The statute is codified at 12 U.S.C.A. § 1735f-7, as follows:

> (a) The provisions of the constitution of any State expressly limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved by lenders and the provisions of any State law expressly limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, or advance which is insured under subchapter I or II of [the National Housing Act].
>
> (b) The provisions of subsection (a) shall apply to loans, mortgages, or advances made or executed in any State until the effective date (after December 21, 1979) of a provision of law of that State limiting the rate or amount of interest, discount points, or other charges on any such loan, mortgage, or advance.

Although this section does not refer expressly to mobile home loans, the National Housing Act includes certain mobile home loans within the class of insurable loans. 12 U.S.C.A. § 1703.

The VA preemption statute was enacted as section 401 of the Veterans' Disability Compensation and the Survivors' Benefits Amendments of 1979, Pub. L. No. 96-128, 93 Stat. 982, 986-87, approved November 28, 1979. It is codified at 38 U.S.C.A. § 1828 (as amended in 1981), as follows:

> If, under any law of the United States, loans and mortgages in-

final approval several days before the FHA statute. It makes the VA exemption the same as that provided for FHA loans. Therefore, the intent and consequences of both statutes should be the same on the issue before us.

Although the published legislative history regarding the FHA preemption statute gives little guidance as to Congress' purpose in enacting the federal preemption, the VA legislative history provides some insight as to the purpose of the joint FHA/VA preemption.

The Senate Report accompanying the VA legislation noted that although the purpose of state usury laws is to protect state residents against exorbitant interest rates, the laws may effectively "bar lenders from making VA loans and thus prevent veterans from using their loan-guaranty entitlement." S. Rep. No. 260, 96th Cong., 1st Sess. 30, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1894, 1916. Usury limits in several states were impeding FHA and VA loans, and in Arkansas, the state limit was so low as to have "brought VA loan activity to a virtual halt." *Id.* The purpose of the preemption provision was to assure, to the maximum extent possible in any jurisdiction

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sured under title I or title II of the National Housing Act are exempt from the application of the provisions of any State constitution or law (1) limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved by lenders, (2) restricting the manner of calculating such interest (including prohibition of the charging of interest on interest), or (3) requiring a minimum amortization of principal, then loans guaranteed or insured under this chapter are also exempt from the application of such provisions.

"Under this provision, wherever loans insured by the Federal Housing Administration (FHA) are exempted from a State anti-usury provision by a provision of the National Housing Act, . . . VA loans would also be exempted. In this way, the coordination of Federal policy regarding the exemption of VA and FHA home loans from State anti-usury provisions would be assured." S. Rep. No. 260, 96th Cong., 1st Sess. 29, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1894, 1915.

in which FHA loans were exempt, that a veteran seeking to use his or her loan-guarantee entitlement for a conventional home, mobile home, or any other authorized purpose would not be discouraged or prevented by reason of a state anti-usury provision. Explanation of House Bill, Senate Amendment, and Compromise Agreement, 125 Cong. Rec. 16,753, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1966, 1969. Under both the FHA and VA provisions, however, "the State's right to set an interest-rate limitation that overrides the Federal exemption would be preserved." S. Rep. No. 260, *supra,* at 31.[4]

Within four months after the FHA and VA exemptions became law, Congress enacted a third federal preemption provision, DIDMCA, referred to here as section 501.[5] This statute preempts state usury laws with regard to a broad range of residential loans and lenders. A Senate committee reported that the bill was a response to the finding that in states where usury laws require mortgage rates below market levels of interest, mortgage funds will not be readily available and those funds will flow to other states where market yields are available. This artificial disruption of funds availability is harmful to potential homebuyers in states with such usury laws and frustrates national housing policies and programs. S. Rep. No. 368, 96th Cong., 2d Sess. 19, *reprinted in* 1980 U.S. Code Cong. & Ad. News 236, 254.[6]

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[4]Under the scheme in the VA statute, "any State that overrode the exemption for FHA loans would also be overriding the exemption for VA loans." S. Rep. No. 260, *supra* note 3, at 31. The purpose of providing for an exemption in this manner was "to assure a coordinated Federal policy with regard to the application of State anti-usury provisions to FHA and VA home loans." *Id.*

[5]Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), Pub. L. No. 96-221, § 501, 94 Stat. 132, 161-63 (codified as amended at 12 U.S.C.A. § 1735f-7 note).

[6]The committee further opined that "this modification in state usury

Because of "the congressional policy of permitting a state the primary opportunity to determine its usury statutes," *id.* at 18, however, section 501 provided that an individual state could within three years enact a law specifying that the state intended to override section 501.

In order for mobile home financing to come under the DIDMCA preemption, the financing contract must contain certain consumer protection provisions specified in Federal Home Loan Bank Board regulations.[7]

This Court concludes that although the DIDMCA statute encompasses the "federally related" mobile home loans involved in this case and therefore overlaps with the FHA and VA preemptions, this dual coverage does not nullify the FHA and VA preemptions as applied to mobile home loans. FHA or VA lenders may obtain federal preemption under the respective FHA or VA preemption without also satisfying the DIDMCA requirements. If, however, the state has overridden the FHA/VA preemption, the lender may still qualify for federal preemption by complying with the DIDMCA regulations (unless, of course, the state has also overridden the DIDMCA preemption). These conclusions come from the following analysis.

All of the statutes in question were enacted by the 96th Congress in a six-month time span. The same House and

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laws will enhance the stability and viability of our Nation's financial system and is needed to facilitate a national housing policy and the functioning of a national secondary market in mortgage lending." S. Rep. No. 368, *supra*, at 19.

[7]These include late charges only when a payment is 15 days late, and 30 days notice before acceleration or foreclosure. Both the Doyle and Wood contracts permit assessment of a late charge for any payment which is 10 days late and do not contain a requirement of notice before acceleration or foreclosure. Under this Court's recent decision in *Quiller v. Barclays American/Credit, Inc.*, 764 F.2d 1400 (11th Cir. 1985) *(en banc), adopting* 727 F.2d 1067 (11th Cir. 1984), *cert. denied*, 54 U.S.L.W. 3762 (1986), the Doyle and Wood contracts are not entitled to the DIDMCA preemption.

Senate committees considered both the FHA and DIDMCA statutes.

The FHA and VA statutes aimed at addressing the specific problem of state usury laws restricting FHA and VA home loan availability to qualified purchases. In contrast, the purpose of DIDMCA was more wide-ranging. DIDMCA applied not only to federally insured loans but to all home loans, including conventional loans, which were in some way "federally related," a phrase defined broadly in section 501. "The law seeks to facilitate the free flow of capital into states with restrictive interest rates." *Recent Developments*, 36 Bus. Law. 1237, 1243 (1981). Congress believed the DIDMCA preemption was needed to enhance the stability of the national financial system and to facilitate a national housing policy.[8]

It is unreasonable to believe that Congress, in addressing the more immediate concern of FHA and VA loan availability to individual borrowers, would require the lender to comply with the additional DIDMCA regulations in order to obtain federal preemption. The district court and plaintiffs have placed great reliance on the supposedly "better" consumer protection the DIDMCA regulations provide. Nothing, though, indicates that the FHA and VA protections are inadequate.[9] Although the regulations ap-

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[8] "A stable home financing system was the principal reason for the establishment by the federal government of the FHA and VA associations and the national secondary market mechanisms." S. Rep. No. 368, *supra*, at 19.

[9] In the House Conference Report accompanying the FHA legislation, the conferees noted their awareness that

> . . . installment credit sale contracts have been criticized for frequently containing provisions which do not adequately protect consumers. However, the conferees note that with respect to such contracts used to finance mobile homes under Title I of the National Housing Act, FHA regulations already provide significant protections by prohibiting both the Rule of 78 and balloon pay-

pearing under DIDMCA are not identical to the FHA and VA regulations,[10] they address similar concerns and overlap substantially. Indeed, the House Conference Report accompanying DIDMCA stated: "The conferees intend that in developing [the DIDMCA] regulations the Bank Board should look for guidance to regulations, handbooks and circulars of the FHA and VA regarding mobile home lending . . . ." H.R. Conf. Rep. No. 842, 96th Cong., 2d Sess. 79, *reprinted in* 1980 U.S. Code Cong. & Ad. News 298, 309.

Several other points support independent interpretation of the FHA, VA, and DIDMCA preemptions. First, section 529 of DIDMCA repealed certain existing laws but made no mention of the FHA or VA preemption statutes. Second, section 528 of DIDMCA[11] demonstrates that Congress intended to retain independent vitality in the respective statutory schemes. Finally, a HUD opinion letter supports this interpretation.[12]

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ments, and by limiting late charges. FHA also provides an interest rate ceiling.

H.R. Conf. Rep. No. 706, 96th Cong., 1st Sess. 61, *reprinted in* 1979 U.S. Code Cong. & Ad. News 2402, 2420.

[10]The regulations governing FHA-insured manufactured home loans, appearing at 24 C.F.R. §§ 201.501-.680, require prepayment rebates, prohibit the use of balloon payments, and govern late charges and refinancing. Additionally, although that limitation has now been repealed, the FHA regulations limited the maximum permissible finance charge at the time Doyle obtained his loan. Similar regulations, appearing at 38 C.F.R. § 36.4201 *et seq.*, govern VA-insured manufactured home loans.

[11]"In any case in which one or more provisions of, or amendments made by, this title, section 529 of the National Housing Act, or any other provision of law . . . apply with respect to the same loan, mortgage, credit sale, or advance, such loan, mortgage, credit sale, or advance may be made at the highest applicable rate." 12 U.S.C.A. § 1735f-7 note.

[12]An April 1, 1985, opinion letter from Shirley Wiseman, General

At the time the FHA and VA preemptions were enacted, DIDMCA was well through the congressional committee process. It simply defies reason that Congress would enact one preemption if it were considering a second preemption which would render the first meaningless. This Court holds that a lender entitled to preemption under the FHA or VA statutes need not comply with the DIDMCA regulations.

B. State Override

The next question presented to this Court is whether the State of Georgia has overridden the FHA and VA preemptions. The district court did not reach this issue due to its resolution of the first issue. Because under the VA provisions "any State that overrode the exemption for FHA Loans would also be overriding the exemption for VA loans," S. Rep. No. 260, *supra*, at 31, this Court need only examine whether Georgia has overridden the FHA provision.

Soon after the effective date of the FHA and VA preemption statutes, the Georgia General Assembly amended O.C.G.A. § 10-1-33 to raise the interest limit on Class 1 "motor vehicle" retail installment contracts to 10% add-on. "Motor vehicle" loans are defined to include mobile home loans, but section 10-1-33 does not apply to other types of home loans or mortgages. The 1980 amendments

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Deputy Assistant Secretary for Housing, clarifying HUD letter TI-352 (Supplement), states: "It was then, and is now, this Department's interpretation of the two preemption laws that they are separate and independent of each other, and that if a manufactured home lender can charge a preemptive interest rate pursuant to § 529 of the National Housing Act it need not rely upon § 501 of the Deregulation Act, and thus need not comply with 12 C.F.R. 590.4."

to section 10-1-33 refer to neither "federally insured" loans nor the FHA/VA preemption statutes. 1980 Ga. Laws 523.[13]

The finance companies argue that the phrase "*such* loan, mortgage, or advance" in the FHA statute, 12 U.S.C.A. § 1735f-7(b), quoted *supra* note 3, refers back to subsection 9(a) of the statute, and that the state law must refer specifically to loans insured under titles I and II of the National Housing Act in order to override the preemption. Plaintiffs, on the other hand, suggest that "such loans" refers to the type of loan being made, such as real estate loans or mobile home loans, and that a state need only pass a statute regulating the general type of credit transaction. Because Georgia subsequently amended GMVSFA to raise and "reinstate" the usury limits on mobile home contracts, plaintiffs argue, Georgia has overridden the FHA and VA preemptions for mobile home transactions.

The language of the FHA statute is less than clear and would support either of these interpretations. The legislative history, moreover, provides no firm guidance.[14] The

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[13]The Act itself states that it amends GMVSFA "so as to change the limitations on finance charges; to provide for the computation of "finance charges on an actuarial basis in addition to the add-on basis; to delete the acquisition charge; to provide for other matters relative thereto; to provide for an effective date; to provide for automatic repeal; to provide for reinstatement of certain finance charges; to repeal conflicting laws; and for other purposes." 1980 Ga. Laws at 523-24. A 1981 amendment struck the repealer provision. 1981 Ga. Laws 703.

[14]The Senate Committee Report on the FHA legislation notes that the preemption "would not apply where a state subsequently reenacts a usury limit *applying to FHA Loans.*" S. Rep. No. 164, 96th Cong., 1st Sess. 33 (1979). Similarly, the House Report notes that "subsequent to the date of enactment of this Act, the states may act to *subject these FHA instruments* to state usury ceilings." H.R. Rep. No. 154, 96th Cong., 1st Sess. 24, *reprinted in* 1979 U.S. Code Cong. & Ad. News 2317, 2340. On the one hand, this language could be read to require specific reference to FHA instruments in the state law. On the other, it could be read as simply requiring that the state law "apply" to FHA insured loans without necessarily singling them out in the

Court concludes, however, that the statute must be read to require only that the state reenact its anti-usury provision and not to require specific reference to FHA-insured loans.

Unlike the FHA preemption, the DIDMCA preemption is clear in mandating specific language in the state override provision.[15] Congress was already considering this language at the time that the FHA preemption was enacted. Congress knew the type of language to use when

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statute.

In another part of the House Report, the House committee states:

> Section 310 of the bill would add a new section 529 to the National Housing Act which would provide that the provision of any State constitution or law expressly limiting the rate or amount of interest, discount points or other charges which may be charged or received by lenders shall not apply to any loan, mortgage or advance which is insured under titles I or II of the National Housing Act. The section would also provide that this exemption would not apply to such loans, mortgages or advances if a State were to enact *such a limitation* after the effective date of this section.

Id. at 63. The phrase "such a limitation" here seems to refer to the state's general usury law; that is, the state need only reenact its usury law to override the preemption. The Senate Report accompanying the VA legislation also supports this interpretation. Discussing the effect of the FHA Legislation, the Senate Report states that loans insured under title I or II of the National Housing Act "would not be exempt in any State that reinstated its anti-usury provision after the effective date of the new Federal law." S. Rep. No. 260, *supra* note 3, at 31.

[15]

> [T]he provisions of subsection (a)(1) shall not apply to any loan, mortgage, credit sale, or advance made in any State after the date (on or after April 1, 1980, and before April 1, 1983) on which such State adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, *which states explicitly and by its terms* that such State does not want the provisions of subsection (a)(1) to apply with respect to loans, mortgages, credit sales, and advances made in such State.

Section 501(b)(2) (codified at 12 U.S.C.A. § 1735f-7 note).

it intended that state override provisions make specific reference to the federal preemption. The Department of Housing and Urban Development apparently also interprets the respective statutes in this manner.[16]

The lenders have argued that it is illogical to conclude that a state could override the FHA and VA preemptions by merely adjusting the permissible interest rate on some loans which may be insured, as there would be many unintentional overrides, and the result would create instability in the FHA and VA programs and frustrate the policies behind the federal legislation. This argument overstates the case. The FHA and VA preemptions were enacted in large part because individual states had been unable or unwilling to amend their usury limits to reflect increases in market interest rates. Congress was concerned with assisting states such as California and Arkansas, which had troublesome procedures for removing or raising state constitutional or statutory limits. *See, e.g.*, S. Rep. No. 260, *supra*, at 30. At the same time, Congress recognized its traditional deference to the state's right to determine its usury statute. When the state goes through the entire legislative or constitutional process of reenacting or amending its usury limitation, it is unlikely that it will

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[16]The April 1985 letter from the General Deputy Assistant Secretary for Housing, *supra* note 12, states that under the FHA preemption "an override occurs if a State enacts a provision of law after the effective date of § 529 which limits the rate or amount of interest, discount points, or other charges on a manufactured home loan. . . . On the other hand, the ability of a State to override the § 501 [DIDMCA] preemption is more circumscribed, because . . . the State must either adopt a law or certify that the voters of the State have voted in favor of a provision which states explicitly and by its terms that it does not want the provisions of § 501(a)(1) to apply in that State." Additionally, the letter sets forth four scenarios of possible legislative action. In three of those scenarios, the state "enacts a law which limits the rate or amount of interest, discount points, or other charges *on a manufactured home loan.*" In all three scenarios, the letter concludes that the state has overridden the FHA preemption.

do so in ignorance of the federal preemptions or of market forces. For a state to raise its usury limit in response to changes in market interest rates is consistent with the purpose of the FHA and VA preemptions. The Court determines, given Congress' deference to states' rights to fix their own usury law, as well as the purpose behind the federal law, that when a state reenacts or raised its usury limit on a particular class of loans, it overrides the FHA and VA preemptions for that type of loan in the absence of a contrary statement.

C. Statute of Limitations

Although defendants presented a statute of limitations defense in their answers, the issue was neither argued nor addressed in the district court. Defendants argue that these actions are barred because both actions were instituted more than one year after the respective contracts were formed. Although GMVSFA and its penalty provision state no limitations period themselves, defendants suggest that the general one-year statute applying to usury actions contained in O.C.G.A. § 7-4-10(d) applies here as well.[17]

The issue is amendable to prompt resolution in this appeal. The Court agrees that O.C.G.A. § 7-4-10(d) seems to apply in these actions, but disagrees with defendants regarding the effect of this statutory bar. Rather than concluding that this statute acts as a complete bar to actions filed more than a year after contract formation, the courts interpreting the statute have held that it bars only actions to affirmatively recover interest paid more than a year before the action was instituted. *Duderwicz v. Sweetwater Savings Association,* 595 F.2d 1008, 1115 n.11 (5th Cir. 1979); *Reconstruction Finance Corp. v. Puckett,* 181 Ga. 288, 181 S.E. 861 (1935); *Family Home Services, Inc. v. Taylor,* 142 Ga. App. 386, 236 S.E.2d 28

[17]"No plea or action for the recovery of such forfeiture shall be barred by lapse of time shorter than one year." O.C.GA. § 7-4-10(d).

(1977); *Hartsfield Co. v. Watkins*, 67 Ga. App. 411, 20 S.E.2d 440 (1942).

D. Retroactivity

The district court decided that a Georgia statute enacted in 1983 which removes the interest rate ceiling on mobile home installments sales contracts in excess of $3000.00[18] did not apply to these lawsuits filed after the statute's effective date as to contracts executed before that date. If the statute is applied retroactively to loans predating the statute, then plaintiffs would have no cause of action.

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[18]In 1983, the Georgia General Assembly enacted wide-ranging amendments pertaining to interest and usury, some of which relate to mobile home financing. 1983 Ga. Laws 1146. In section 7 (codified at O.C.G.A. § 7-4-20), the legislature exercised its prerogative to override section 501 of DIDMCA for loans, mortgages, credit sales, and advances made in Georgia on or after March 31, 1983. Concurrently, the legislature removed interest rate limits on mobile home retail installment contracts of $3000.00 or more. "Notwithstanding the provisions of subsections (a) through (c) of Code Section 10-1-33, any retail installment contract pertaining to . . . [a]ny manufactured home with a cash sales price of more than $3,000.00 . . . may provide for such finance charge as the parties may agree in writing." Section 2 (codified at O.C.G.A. § 7-4-3(a)). The legislature required, though, that any such contract comply with the DIDMCA regulations. Any person failing to comply with these regulations would be subject to the liability specified in O.C.G.A. § 7-4-5. Section 7-4-5 specifies that the person will be liable for (1) any actual damage sustained by the other person as a result of the failure, as well as (2) twice the amount of any interest or finance charge contracted for in connection with the transaction, "except that the liability under this paragraph shall not be less than $100.00 nor greater than $1,000.00." This liability may only be asserted in an individual action, "provided, however, this provision shall not apply to any class action pending prior to March 31, 1983." Although the amendments provided that O.C.G.A. § 10-1-33 would not apply to mobile home retail installment contracts of $3000.00 or more, section 10-1-33 itself was left unamended.

The Georgia courts now hold unequivocally, in the absence of a savings clause, that repeal of a usury limit operates retroactively to lift the penalty for usury. *See, e.g., Ward v. Hudco Loan Co.*, 254 Ga. 294, 328 S.E.2d 729 (1985); *Fountain v. Dixie Finance Corp.*, 252 Ga. 543, 314 S.E.2d 906 (1984); *Dorsey v. West*, 252 Ga. 92, 311 S.E.2d 816 (1984); *Southern Discount Co. v. Ector*, 246 Ga. 30, 268 S.E.2d 621 (1980); *Wasser v. Citizens & Southern National Bank*, 170 Ga. App. 872, 318 S.E.2d 518 (1984). At least one section of the 1983 Act has been held retroactive. In *Ward v. Hudco Loan Co.*, the court held retroactive the amendment to O.C.G.A. § 7-4-2(a)(1).[19]

The district court held, however, that these normal rules of construction cannot apply in this case. In all of the prior cases, the legislature simply abolished the interest limits applying to a particular class of loans. Here, the legislature coupled this removal with a requirement that retail installment contracts comply with certain federal regulations. Although the removal is not "conditioned" *per se* on compliance with the regulations, the legislature obviously intended for there to be a trade-off: in exchange for losing usury law protection, prospective borrowers would receive other consumer protections.

The district court concluded that logically the legislature would have considered these protections no less important for contracts preceding March 30, 1983. Many of these contracts, though, would not contain the federal protections. Moreover, if the legislature attempted to apply the new penalty provisions to pre-1983 Act contracts, the district court thought serious constitutional questions would arise. Rather than applying only part of the new statute to the pre-Act contracts, the district court determined that

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[19] "Notwithstanding the provisions of other laws to the contrary, except Code Section 7-4-18, the parties may establish any rate of interest . . . agreed upon in writing by the parties where the principal amount involved is more than $3,000.00 . . . ." O.C.G.A. § 7-4-2(a)(1).

it is more likely that the Georgia General Assembly intended the "package" to apply only as a whole to loans post-dating the Act's effective date.

Because this question of state law appears to control the outcome of this action and there are no clear controlling precedents in the decisions of the Supreme Court of Georgia, we certify the question to the Supreme Court of Georgia pursuant to Rule 37 of the Rules of the Supreme Court of Georgia.

CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF GEORGIA PURSUANT TO RULE 37 OF THE SUPREME COURT OF GEORGIA TO THE SUPREME COURT OF GEORGIA AND THE HONORABLE JUSTICES THEREOF.

Question to be Certified

Whether section 2 of 1983 Ga. Laws 1146, O.C.G.A. § 7-4-3(a), which provides that O.C.G.A. § 10-1-33 shall not apply to retail installment contracts pertaining to any manufactured home with a cash sales price of more than $3,000.00, operates retroactively so as to eliminate any cause of action a manufactured home purchaser may have acquired under O.C.G.A. § 10-1-38 by a transaction prior to the 1983 Act's effective date.

The phrasing used in the certified question is not to restrict the Supreme Court's consideration of the issue in its analysis of the record certified in this case. This extends to the Supreme Court's restatement of the issue and the manner in which the answer is given. *See Martinez v. Rodriques*, 394 F.2d 156, 159 n.6 (5th Cir. 1968).[20]

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[20] The Georgia General Assembly amended O.C.G.A. § 10-1-33 in 1985 to add a new subsection (d), effective April 2, 1985: "Notwithstanding

The clerk of the court is directed to transmit this certificate, as well as the briefs and record filed with the court, to the Supreme Court of Georgia and simultaneously to transmit copies of the certificate to the attorneys for the parties.

QUESTION CERTIFIED.

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the provisions of subsection (a) of this Code section, a buyer and a seller may establish any finance charge agreed upon in writing by the parties where the amount financed is more than $5,000.00." § 2, 1985 Ga. Laws 698, 699. None of the parties pointed out this amendment in either their briefs or at oral argument, but the appellee has cited it in a post-argument submission. In considering the issue certified in this case, the Supreme Court of Georgia is, of course, free to consider any effect this 1985 amendment might have on the present cases.

APPENDIX "B"

256 Ga. 790

SOUTHERN GUARANTY CORPORATION et al.

v.

DOYLE et al.

No. 43711.

Supreme Court of Georgia.

March 12, 1987.

The United States Court of Appeals for the 11th Circuit, 795 F.2d 907, certified question to the Georgia Supreme Court concerning whether certain laws relating to interest limits should be applied retroactively to retail installment sales contracts for mobile homes. The Supreme Court, Bell, J., held that: (1) The General Assembly intended usury law amendment to have prospective application only, and (2) usury law subsection, which abolishes interest limits for motor vehicle installment sales contracts in excess of $5,000, did not apply to retail installment contracts for mobile homes.

Question answered.

Wyckliffe A. Knox, Jr., Raymond G. Chadwick, Jr., Wildman, Harrold, Allen, Dixon & Branch, Susan L. Kupferberg, Knox & Zacks, Augusta, Douglas N. Campbell, Laura E. Stevenson, Mitchell, Loggins, Campbell & Elsberry, Atlanta, for Southern Guar. Corp. et al.

John B. Long, Nixon, Yow, Waller & Capers, David E. Hudson, Hull, Towill Norman & Barrett, Thomas W. Tucker, Dye, Miller, Tucker & Everritt, Augusta for Richard Doyle et al.

Hansell & Post, W. Rhett Tanner, Michael J. Templeton, Douglas N. Campbell, Laura E. Stevenson, Kenneth G. Levin, amici curiae.

BELL, Justice.

This case is here by way of certified question from the United States Court of Appeals for the Eleventh Circuit. See Rule 37 of the Supreme Court of Georgia; OCGA § 15-2-9; *Doyle v. Southern Guaranty Corp.*, 795 F.2d 907 (11th Cir. 1986). It concerns the question whether certain laws relating to interest limits should be applied retroactively.

Appellee Doyle purchased a new mobile home from Family Homes Sales Center, Inc., pursuant to a retail installment sales contract dated January 25, 1983. The contract was assigned to appellant Southern Guaranty Corporation. Appellee Jimmy Wood purchased his mobile home on February 25, 1982, under a retail installment sales contract which was assigned to appellant Fort Wayne Mortgage Company.

Doyle and Wood (hereinafter the borrowers) subsequently sued Southern Guaranty Corporation and Fort Wayne Mortgage Company (hereinafter the lenders) under the Georgia Motor Vehicle Sales Finance Act (hereinafter GMVSFA), OCGA §§ 10-1-30 to 38. It is undisputed that both contracts involved here exceeded the maximum rate of interest (10% add-on) then allowed under OCGA § 10-1-33. The borrowers sought forfeiture of finance charges, plus penalties. OCGA § 10-1-38.

1. We will first discuss certain of the lenders' defenses which have been handled adversely to them by the Eleventh Circuit. Although our discussion is not necessary, strictly speaking, to a resolution of the question certified to this court, it will provide the reader with a better understanding of the case.

The lenders defended in reliance, inter alia, on certain federal preemption statutes which exempt mobile home financing contracts from state usury laws if the contracts include consumer protections specified by the preemption statutes. There are three preemption statutes which are relevant here: the FHA,[1] the VA,[2] and section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (hereinafter DIDMCA).[3] However, none of these statutes exempts the lenders in the instant case from the financing limits of OCGA § 10-1-33.

Doyle's contract is an FHA-insured agreement; Woods is a VA-insured agreement. Doyle's and Wood's contracts do contain the necessary FHA and VA consumer protections, but the Eleventh Circuit has held that, notwithstanding the inclusion of those protections, the lenders cannot avail themselves of either preemption statute. The reason, according to the Eleventh Circuit, is that when our General Assembly amended OCGA § 10-1-33 in 1980 (raising the interest rate limit from 8% add-on to 10% add-on), it invoked other provisions of the FHA and VA preemption statutes which under certain circumstances permit the states to override the FHA and VA preemptions. See *Doyle v. Southern Guaranty Corp.*, supra, 795 F.2d at 912-914.

The lenders' mobile home contracts also fall under DIDMCA, but it is undisputed that the contracts do not contain the consumer protections required by DIDMCA. Therefore, DIDMCA does not exempt those contracts from § 10-1-33.

2. For purposes of the certified question, the lenders' pertinent defense was that the 1983 amendment of OCGA

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[1] 12 U.S.C. § 1735f-7.

[2] 38 U.S.C. § 1828.

[3] 12 U.S.C. § 1735f-7 note.

§ 7-4-3, effective March 31, 1983,[4] eliminated the causes of action of Doyle and Wood, even though they entered into their contracts before the amendment's effective date.

With regard to this defense, the Eleventh Circuit has certified the following question to us: "Whether [the 1983 amendment to OCGA § 7-4-3(a)], which provides that OCGA § 10-1-33 shall not apply to retail installment contracts pertaining to any manufactured home with a cash sales price of more than $3,000.00 [which the contracts in question exceeded] operates retroactively so as to eliminate any cause of action a manufactured home purchaser may have acquired under OCGA § 10-1-38 by a transaction prior to the 1983 Act's effective date." *Doyle v. Southern Guaranty Corp.*, supra, 795 F.2d at 915-916.

The Eleventh Circuit also added that we are free to consider what effect, if any, a 1985 amendment to OCGA § 10-1-33, which added a new subsection (d), see 1985 Ga.Laws, 698, 699, might have on the present case. *Doyle*, supra, 795 F.2d at 916, fn. 20. New subsection (d) provides that notwithstanding subsection (a) of § 10-1-33, "a buyer and a seller may establish any finance charge agreed upon in writing by the parties where the amount financed is more than $5,000.00."

3. The lenders, relying on *Ward v. Hudco Loan Company*, 254 Ga. 294, 328 S.E.2d 729 (1985); *Fountain v. Dixie Finance Corp., 252 Ga. 543, 314 S.E.2d 906 (1984); and Southern Discount Co. v. Ec'or*, 246 Ga. 30, 268 S.E.2d 621 (1980) contend that the 1983 amendment to OCGA § 7-4-3 should be applied retroactively to defeat Doyle's and Wood's causes of action.

We agree with the lenders that the above cases establish a general rule that the repeal of usury limits should be construed liberally so as to give lenders relief if possible. This is so because forfeitures and penalties are not favored

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[4]See 1983 Ga.Laws, 1146, § 2.

and because the defense of usury does not go to the merits of and is not a bargained-for-element of the contract, but is instead a privilege belonging to the remedy, given to the borrower by statute. *Ward v. Hudco Loan Co.*, supra, 254 Ga. at 297, 328 S.E.2d 729; *Fountain v. Dixie Finance Co.*, supra, 252 Ga. at 543–544, 314 S.E.2d 906; *Southern Discount Co. v. Ector*, supra, 246 Ga. at 30–31, 268 S.E.2d 621. The lenders, however, do acknowledge that the issue of retroactivity of law is "at last and always a question of legislative intent." *Canton Textile Mills, Inc. v. Lathem*, 253 Ga. 102, 103(1), 317 S.E.2d 189 (1984).[5]

In the instant case, we find that there is a clear legislative intent that the 1983 amendment of OCGA § 7–4–3(a) should not be applied retroactively. From the time the DIDMCA preemption became effective in 1980 until March 31, 1983, the effective date of the amendment of OCGA § 7–4–3(a), two categories of lawful interest rates existed in Georgia. One was based on the 1980 amendment of OCGA § 10–1–33 setting the maximum lawful rate of interest at 10% add-on; under it a lender had to charge 10% add-on or less, but was not required to give the consumer protections required by DIDMCA. The other category was based on DIDMCA; under it a lender could charge in excess of 10% add-on if it provided the consumer protection benefits required by DIDMCA. If the consumer protections were not provided, then the lender would lose the DIDMCA preemption and would be subject to the interest limits of OCGA § 10–1–33.

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[5]We note that a savings clause is not a prerequisite to the prospective application of a law repealing a usury limit. Language to that is contained in a quote from *Ewell v. Daggs*, 108 U.S. 143, 150–151, 2 S.Ct. 408, 413–414, 27 L.Ed. 682 (1883), first appearing in *Fountain v. Dixie Finance*, supra, 252 Ga. at 543–544, 314 S.E.2d 906. However, none of the cases by this court determining the retroactivity of the repeal of usury limits have turned on absence of a savings clause. See *Ward*, supra, 254 Ga. 294, 328 S.E.2d 729; *Fountain v. Dixie Finance Co.*, 252 Ga. 543, 314 S.E.2d 906 (1984); *Southern Discount Co. v. Ector*, 246 Ga. 30, 268 S.E.2d 621 (1980).

With the amendment of OCGA § 7-4-3(a) in 1983 the General Assembly abolished the interest limits applying to mobile home loans in excess of $3,000. OCGA § 7-4-3(a)(1). This removal of interest limits, however, was coupled with the requirement that lenders provide consumers the protections required by DIDMCA. OCGA § 7-4-3(b)(1). Although the removal of the ceiling on interest rates was not, like DIDMCA, dependent upon compliance with the DIDMCA regulations (instead, noncompliance is sanctioned by the liability specified in § 7-4-5), "the legislature obviously intended for there to be a trade-off: in exchange for losing usury law protection, prospective borrowers would receive other consumer protections." *Doyle v. Southern Guaranty Corp.*, supra, 795 F.2d at 915.

None of the previous cases relied on by the lenders dealt with legislation with such a trade-off. Moreover, we find this trade-off indicative of the legislative intent regarding the retroactivity *vel non* of the relevant provisions of the 1983 amendment to § 7-4-3. If we were to adopt the lenders' position and apply OCGA § 7-4-3(a)(1), as amended in 1983, retroactively, a third category of permissible loan contracts would be created for the period preceding March 31, 1983. Under it a lender could charge in excess of 10% add-on for loans in excess of $3,000 and the consumer would not be entitled to the protections of DIDMCA. Obviously, the General Assembly, in amending § 7-4-3 in 1983, considered the DIDMCA protections important enough to require lenders to include them in mobile home contracts in excess of $3,000. Logically, the General Assembly would have considered the DIDMCA protections no less important during the period preceding March 31, 1983. It would therefore be unreasonable to conclude that the General Assembly intended to retroactively approve a class of loans with unlimited interest and no DIDMCA protections. Because we should not, in determining legislative intent, ascribe to the legislature an unreasonable intention, e.g., *City of Jesup v. Bennett*, 226

Ga. 606(2), 176 S.E.2d 81 (1970), we conclude that the General Assembly intended for §§ 7-4-3(a)(1) and (b)(1), as amended in 1983, to have prospective application only.

We next consider the lenders' argument that the new subsection (d) added to OCGA § 10-1-33 in 1985 should be applied retroactively to defeat the borrowers' causes of action. As previously noted, new subsection (d) of § 10-1-33 abolishes the interest limits for motor vehicle installment sales contracts in excess of $5,000, notwithstanding the limit provisions of § 10-1-33(a). The lenders argue that since the removal of interest limits under new subsection (d) was not coupled with the grant of DIDMCA protections, no reason exists not to apply new subsection (d) retroactively. We disagree.

The provisions of the GMVSFA, of which § 10-1-33 is a part, apply to motor vehicles. The GMVSFA has been applied to mobile homes because of the judicial construction given to the definition of "motor vehicle" appearing at OCGA § 10-1-31(a)(4). E.g. *Holder v. Brock*, 129 Ga. App. 732, 200 S.E.2d 912 (1973).

The General Assembly, however, by amending OCGA § 7-4-3 in 1983 created laws which specifically apply to *mobile home* retail installment contracts. As previously noted, OCGA § 7-4-3(a)(1) removes the interest limit for mobile home installment sales contracts in excess of $3,000, while § 7-4-3(b)(1) requires lenders for such contracts to grant consumers the protections of DIDMCA. Moreover, the 1983 amendment to § 7-4-3 distinguishes between mobile home contracts and motor vehicle contracts. The amendment abolishes the interest limit on *motor vehicle* loans in excess of $5,000, § 7-4-3(a)(2),[6] and only extends the consumer protection of DIDMCA to mobile home in-

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[6]We note that new subsection (d) of § 10-1-33, as enacted in 1985, is identical to § 7-4-3(a)(2), as amended in 1983.

stallment sales contracts and not to motor vehicle installment sales contracts, § 7-4-3(b)(1).

Since the General Assembly, beginning in 1983, has distinguished between mobile home loans and motor vehicle loans, and since §§ 7-4-3(a)(1) and (b)(1), as amended in 1983, deal specifically with mobile home installment sales contracts, whereas § 10-1-33(d), as amended in 1985, does not, we conclude that OCGA §§ 7-4-3(a)(1) and (b)(1) express the controlling legislation and legislative intent on mobile home installment sales contracts in excess of $3,000. Moreover, we note that the retroactive application of new subsection (d) of OCGA § 10-1-33 to mobile home installment contracts would defeat the legislative intent, discussed in Division 3, supra, of the 1983 amendment of OCGA § 7-4-3, which couples the abolishing of interest limits on mobile homes with the granting of consumer protections. For the foregoing reasons, the lenders' reliance of § 10-1-33(d), as amended, fails.

5. In addition to the foregoing, we conclude that OCGA § 10-1-36.1, added to GMVSFA in 1985, see 1985 Ga.Laws at 699, also expresses an intent by the General Assembly that neither the 1983 amendment of OCGA § 7-4-3, nor the addition of new subsection (d) to § 10-1-33 in 1985 (assuming it did apply to mobile home loans, see division 4, supra) was intended to apply retroactively. OCGA § 10-1-36.1(a) bars all class actions for violation of GMVSFA, but subsection (b) exempts from this bar all class actions involving mobile homes pending as of February 22, 1985. If the General Assembly had intended for either the 1983 amendment to § 7-4-3 or the 1985 addition of new subsection (d) to § 10-1-33 to apply retroactively, the inclusion of the exemption in OCGA § 10-1-36.1 for class actions pending on February 22, 1985, would have been unnecessary, for such class actions would have been abolished by the retroactive application of those laws.

6. For the reasons expressed above, we answer the certified question in the negative and conclude that new subsection (d) of § 10-1-33 is of no avail to the lenders.

Certified Question Answered.

All the Justices concur.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 85-8187, 85-8297.

Richard DOYLE, Plaintiff-Appellee,
v.
SOUTHERN GUARANTY CORPORATION, Defendant-Appellant.

Jimmy E. WOOD, Plaintiff-Appellee,
v.
FORT WAYNE MORTGAGE CO., Defendant-Appellant.

June 5, 1987.

Appeals from the United States District Court for the Southern District of Georgia; Dudley H. Bowen, Jr., Judge.

Before RONEY, chief Judge, CLARK, Circuit Judge, and FAIRCHILD*, Senior Circuit Judge.

PER CURIAM:

These cases came to this Court on a 28 U.S.C.A. § 1292(b) appeal of legal questions decided by the district court in denying defendants' motions for dismissal for failure to state a cause of action and summary judgment. These are diversity actions in which the plaintiffs-borrowers claim a cause of action under state usury laws, and the defendants-lenders assert various defenses including preemption by certain federal statutes.

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*Honorable Thomas E. Fairchild, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

This court decided three points in controversy, and certified a fourth question of state law to the Supreme Court of Georgia. *Doyle v. Southern Guar. Corp.*, 795 F.2d 907 (11th Cir. 1986). The Georgia court has now answered the question certified. *Southern Guaranty Corp., et al., v. Doyle, et al.*, 256 Ga. 790, 353 S.E.2d 510 (Ga.1987). The denial of defendants' motions to dismiss for failure to state a cause of action and summary judgment is due to be affirmed under the decisions made in those two opinions.

Although the appellants by supplemental brief seek the answers to other questions not presented by their motions and not addressed by the trial court, it is quite apparent that it would be inappropriate for this Court to express any opinion thereon. Appellants' attorneys have overlooked the fact that this is an interlocutory appeal from a denial of a motion to dismiss, while *Quiller v. Barclays American/ Credit Inc.*, 764 F.2d 1400 (11th cir. 1985) (*en banc*), upon which they rely, was an appeal from a final judgment granting a motion to dismiss, in which the district court was reversed.

AFFIRMED and REMANDED.

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

JIMMY E. WOOD,	*	CIVIL ACTION
	*	CV184-204
Plaintiff	*	
	*	
vs.	*	
	*	
FORT WAYNE MORTAGE COMPANY,	*	
	*	
Defendant	*	

Filed
March 13, 1985

ORDER

Before the Court are defendant's motion to dismiss and motion for summary judgment. Plaintiff has opposed the motion. The Court heard oral argument on March 7, 1985.

As the parties admitted at oral argument, to grant defendant's motions would be to require reconsideration of the order in *Doyle v. Southern Guaranty,* CV184-180 (S.D. Ga. Jan. 15, 1985), something I am not inclined to do at this juncture. Accordingly, the Court DENIES defendant's motion to dismiss and motion for summary judgment.*

The Court tentatively certifies the class. The magistrate's order denying defendant's motion for a protective order staying discovery is AFFIRMED.

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*As in *Doyle*, I am of the opinion that this "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

ORDER ENTERED at Augusta, Georgia, this 13th day of March, 1985.

/s/ Dudley H. Bowen, Jr.
UNITED STATES DISTRICT JUDGE

(For the convenience of the Court, a copy of the opinion in *Doyle v. Southern Guaranty*, CV 184-180 (S.D. Ga. Jan. 15, 1985) is attached as Appendix "E")

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

RICHARD DOYLE, ET AL.,	)	CIVIL ACTION NO. CV184-180
Plaintiff,	)	
vs.	)	
SOUTHERN GUARANTY CORPORATION,	)	
Defendant.	)	

Filed
January 15, 1985

ORDER ON APPEAL AND PENDING MOTIONS

Plaintiff instituted this action on October 3, 1984. He asserts claims on his own behalf and for others similarly situated for relief from excessive finance charges on mobile home sales contracts that violate the Georgia Motor Vehicle Sales Finance Act. (GMVSFA). O.C.G.A. §10-1-30-38. Served with the complaint were interrogatories, requests for production of documents, and a motion for class certification.

Defendant, which financed plaintiff's mobile home purchase, answered the lawsuit on October 25, 1984. Plaintiff's motion for certification of the class was tentatively granted by an order of November 2, 1984.

On November 13, 1984, defendant filed motions to dismiss the lawsuit, for summary judgment, to deny class certification, and for a protective order and stay of discovery. The discovery motion was denied by the Magis-

trate, and that denial has been appealed to this Court. Pending the appeal, defendant filed objections to the discovery instituted by plaintiff. Plaintiff has filed a motion to compel answers to the interrogatories and for production of documents, and that motion is also before the Court.

A hearing was conducted on the pending motions on January 7, 1985. Rulings from the bench were made on some of the motions at the conclusion of the hearing. This order will supplement those rulings and address the matters remaining for decision.

I. 1979 VERSUS 1980 PREEMPTION

In support of its summary judgment motion, defendant asserts that the mobile home sales contract with the named plaintiff was preempted from state limits on interest rates or finance charges by 12 U.S.C. §1735f-7 which was enacted as a part of the Housing and Community Development Amendments of 1979, Pub.L. No. 96-153, December 21, 1979. The effect of this legislation was to preempt state laws limiting interest rates or finance charges on any loan "which is insured under Title I or Title II of [the National Housing Act]." Defendant has submitted an affidavit from its president showing that the Doyle loan is insured by the Federal Housing Administration under title I of the National Housing Act.[1]

Plaintiff's response to defendant's reliance on the 1979 legislation is based on the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.L. No. 96-221, §501, 94 Stat. 161, 12 U.S.C.A. §1735f-7 note (West, 1980). (The "1980 Preemption Act"). This legislation was enacted on March 31, 1980. Plaintiff contends

[1]Because of defendant's opposition to discovery, plaintiff has not had the opportunity to challenge the assertions made in defendant's supporting affidvait. For the purposes of the present ruling, the facts stated in the affidavit of Daniel E. Winters will be treated as having been established.

that it is controlling insofar as any loan secured "by a first lien on a residential manufactured home" (mobile home). 1980 Preemption Act, §501(a)(1)(A). For the time period at issue in this case, the Court agrees.

The legislation of December, 1979 broadly preempted state usury laws for any loan insured under title I and II of the National Housing Act. While the legislation did not expressly mention mobile homes, mobile home loans could be included along with the many other types of loans which can be insured under that Act. *See* 12 U.S.C.A. §1703(b) for mobile home loans. The 1980 Preemption Act freed even more types of federally related loans from state usury limitations (§501(a)(1)(C)), and for the first time also contained specific dictates from Congress about preemption of interest rates on mobile home loans.

Unlike the 1979 legislation, the 1980 Act specifically addressed mobile homes, and conditioned the preemption of state usury laws on the requirement that "the terms and conditions" of such a loan comply with consumer protection provisions prescribed by the Federal Home Loan Bank Board (FHLBB). §501(c). In addition, the legislation plainly indicates that Congress intended these requirements to apply even to a mobile home otherwise insured under the National Housing Act. Congress was careful to include definitions in the 1980 Act that would encompass mobile home loans insured under the National Housing Act. §501(a)(1)(C)(ii-iv)). This conclusion is confirmed by the legislative history found in the conference report on this legislation reprinted at 1980 *U.S. Code Cong. & Ad. News* 308, 309.

In a supplemental brief, defendant submitted a copy of a letter from the assistant Secretary of the Department of Housing and Urban Development which discusses to some extent the applicability of the 1979 and 1980 Preemp-

tion Acts in regard to "Title I manufactured home loans."[2] In this letter, the Assistant Secretary merely points out that for a state's usury limits to apply again to a Title I mobile home loan, a state would have to exercise the prerogative granted by Congress to override both the 1979 and the 1980 Acts. Nothing in the letter indicates that a lender is free to disregard the consumer protection benefits in the 1980 Act in a state which has not overridden the Act by subsequent state law. The letter does acknowledge that the 1980 Act applies to FHA insured mobile home loans.

This Court finds in the 1980 legislation an unmistakable intent on the part of Congress to require mobile home loans in states which have not overridden the 1980 Act to afford the consumer protection provisions stated in the legislation and adopted by the FHLBB. Congress was careful to make the 1980 Act applicable not only to mobile home loans in general, but also to mobile home loans insured under the National Housing Act. Therefore, those loans must include the consumer protection provisions required by §501(c) to preempt state law regardless of whether they would otherwise qualify for preemption under the 1979 legislation.[3]

The 1980 Preemption Act was both the latest expression of Congress and the only specific legislation concerning the preemption of state interest rates on mobile home transactions. A "specific statute will be given precedence over a more general one, regardless of their temporal sequence." *Busic v. United States*, 446 U.S. 398, 406 (1980). The conditioning of interest rate preemption upon the grant to mobile home borrowers of consumer protection benefits

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[2]Letter from Maurice L. Barksdale to all approved title I lending institutions, March 2, 1984, TI-352.

[3]Defendant was evidently aware to some extent of the need to comply with the FHLBB regulations. Its form contract used in the Doyle transaction twice makes reference to those regulations at 12 C.F.R. §590.4.

not otherwise found in the law was the obvious intent of Congress. Where the "language employed by the Legislature is plain and free of all uncertainty, . . . the statute speaks its own construction." *Barnes v. Philadelphia & Reading Railroad Company*, 84 U.S. 294 (1873). That is the situation here.

Defendant has not rebutted plaintiff's contention that the Doyle loan charged interest at a rate in excess of the maximum permitted by the GMVSFA. Defendant has not rebutted the contention that the sales contract failed to comply with the consumer protection regulations necessary to preempt the GMVSFA. Defendant's summary judgment motion is therefore denied.

II. THE 1983 AMENDMENTS TO THE GEORGIA USURY STATUTES

Plaintiff contends that the interest rate on his mobile home contract exceeds the 10% add-on limit in the GMVSFA. O.C.G.A. §10-1-3. In Georgia, mobile homes are governed by that Act. *Smith v. Society National Bank*, 141 Ga.App. 19, 20, 232 S.E.2d 367 (1977).

In the 1983 session of the Georgia General Assembly, the usury chapter of the Georgia Code was *amended*[4] to be effective March 31, 1983. Georgia Laws 1983, pp. 1146-1153. In Section 2 of this legislation the General Assembly provided that notwithstanding the GMVSFA, loans for mobile homes with a cash price of more than $3,000 "may provide for such finance charges as the parties may agree." In addition, the legislation required that such contracts afford to the borrowers the "contract provisions required by subsection (c) of Section 501 of [the 1980 Preemption Act]." A loan not providing those consumer protections in

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[4]It is important to note that this statute was amended, not repealed, as have been some other usury provisions. Such amendments are usually considered prospective in their effect.

the contract would be subject to a fine from $100 to $1,000. *Id.* at 1149, 1151; O.C.G.A. §7-4-3, §7-4-5(a)(2). Also in this legislation, Georgia acted to override the preemption contained in §501 of the 1980 Preemption Act effective March 31, 1983.

The defense raised is that this legislation operates retroactively and limits to $1,000 any penalty for a loan made in excess of the limits allowed by the GMVSFA and without compliance with the consumer protections required by the 1980 Preemption Act. Under that theory, the amount in controversy for each class member would be less than the amount necessary to maintain diversity jurisdiction in this Court.

In construing Georgia legislation, "It is the duty of the courts to look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil and the remedy." *Tomlinson v. Sadler,* 99 Ga.App. 482, 484 (2), 109 S.E.2d 84 (1959). The court must not construe a statute to cause it to "result in unreasonable or absurd consequences not contemplated by the legislature." *New Amsterdam Casualty Co. v. Freeland,* 216 Ga. 491, 495, 117 S.E.2d 538 (1960). "The construction must square with common sense and sound reasoning." *Blalock v. State,* 166 Ga. 465, 470, 143 S.E. 426 (1928). It is also the general rule in Georgia that "laws prescribe only for the future." O.C.G.A. §1-3-5. Georgia courts will not give retroactive interpretation to statutes unless there is express or imperative language in the enactment which mandates that result. *Wilmouth v. Henry County,* 251 Ga. 643, 644, 309 S.E.2d 126 (1983); *Hart v. Owens-Illinois, Inc.,* 250 Ga. 397, 398, 297 S.E.2d 462 (1982); *Cox v. Schweiker,* 684 F.2d 310, 318 (5 Cir. 1982). Applying these principles, the Court cannot accept the interpretation advanced by defendant.

Once the 1980 Preemption Act was enacted, two categories of lawful interest rates existed in Georgia until

March 31, 1983. The first category was for any loan that charged 10% or less add-on interest for a new mobile home according to the GMVSFA. The second category was for any loan on a new mobile home with an interest rate greater than 10% add-on but which gave the consumer protection benefits required by the 1980 Preemption Act and the FHLBB regulations. The categories for new mobile home loans were changed by the Georgia legislation of 1983. Beginning March 31, 1983, as a matter of state law a loan of over $3,000 for a mobile home could charge any rate of interest but was required to give the consumer protection benefits which had been created by the 1980 Preemption Act. Defendant's argument is that the 1983 legislation would have the additional effect of validating a third category of loans during that period of April 1 1980, through March 30, 1983. That would be a category of loans charging in excess of 10% add-on interest but not affording the consumer protection benefits required by federal law. That is a construction which this Court finds to be at odds with the obvious intent of the General Assembly.

Since the General Assembly deemed it important enough to condition the lifting of usury limits for mobile home loans in excess of $3,000 with the concurrent granting of consumer protection benefits when it passed the legislation in March of 1983, it is only logical that the General Assembly would have considered those protections no less important during the period of April 1, 1980 through March 30, 1983. The General Assembly is presumed to have enacted the 1983 legislation "with full knowledge of the existing condition of the law and with reference to it," including existing federal law. *Hadley v. Board of Trustees of Employees Retirement System,* ____Ga.App. ____, *320 S.E.2d 620 (1984).*

The language chosen by the General Assembly in the 1983 law to allow higher interest rates on mobile home loans of more than $3,000 shows in yet another way that

the law would have to apply prospectively only. The relief from interest and finance charge limits is expressed in terms of what the parties "may agree." A legislative enactment in March of 1983 could not create a meeting of the minds between parties who completed their contract two months earlier. What parties "may" do implies future conduct only.

Defendant relies on several cases which stand for the proposition that the General Assembly may repeal a usury-type provision and in so doing prevent a borrower form asserting a claim of usury for a transaction entered prior to the repeal but on which suit is not brought until after the effective date of the repealing legislation. *See, e.g., Fountain v. Dixie Finance Corporation of Georgia, Inc.*, 252 Ga. 543, 314 S.E.2d 906 (1984); *Wasser v. C&S Bank*, 170 Ga.App. 872, 318 S.E.2d 518 (1984). Both of these cases concerned claims of excessive finance charges under the Georgia Second Security Deed Act which had been repealed by the General Assembly by the time of each suit.[5] The holding of these cases is not applicable here.

Initially, analysis shows a clear intent by the General Assembly to apply the 1983 legislation prospectively. To do otherwise would be to adopt unreasonable and absurd results which were not intended. In addition, the 1983 legislation at issue here did not repeal the underlying GMVSFA. Georgia Laws 1983, pp. 1148-49. After March 31, 1983, the GMVSFA remained on the books and applicable to sales of mobile homes with cash prices of $3,000

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[5]Defendant also relies upon *Dorsey v. West*, 252 Ga. 92, 311 S.E.2d 816 (1934). That case involved a somewhat different issue that arose from the same repeal of the Georgia Second Security Deed Act. In *Dorsey*, the question was whether repeal of the statute applies to a case already in litigation. The Supreme Court held that where a case was in litigation and the issue of liability had been determined, a subsequent repeal did not deprive a borrower of the defense of usury. Dicta in footnote 4 of the opinion indicates that repeal of such an act would not effect even pending actions.

or less. The matter presently before the Court does not concern a repeal, but rather new legislation which can only be applied reasonably to transactions occurring after its enactment.[6]

The Court finds that it does have subject matter jurisdiction. Consequently, the defendant's motion to dismiss is denied.

III. CLASS ACTION ISSUES

Defendant has moved the Court to revoke the tentative determination that the case should proceed as a class action. Defendant's argument is based upon its assertion that the 1979 Preemption Act rather than the 1980 Preemption Act is controlling on this loan, and also upon the argument that the 1983 Georgia legislation applies retroactively. These arguments have previously been rejected in this order, and the same results obtain for the challenge to class certification.

Another challenge against the case proceeding as a class action is based upon Section 4 of Georgia Laws 1983, pp. 1146, et seq. which is now codified at O.C.G.A. §7-4-5(b). This is an anti-class action provision pertaining to the penalties imposed in this legislation for not affording consumer protection provisions to borrowers on mobile home loans. For the same reasons previously discussed, this Court finds that this provision was intended to apply prospectively only to loans after March 30, 1983. Even if this were not so, the maintenance of a case as a class action is a matter of federal procedural law which is controlling over state law provisions to the contrary under the ra-

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[6]For cases applying preexisting usury laws which were only amended rather than entirely repealed by subsequent litigation, see *Maynard v. Marshall*, 91 Ga. 840, 18 S.E. 403 (1893); *Long v. Gresham*, 148 Ga. 170, 174, 96 S.E. 211 (1918); *Lankford v. Holton*, 187 Ga. 94, 98, 200 S.E. 243 (1938). *Cf. Lindenberg v. First Federal Savings & Loan*, 691 F.2d 974, 975 (11 Cir. 82) [sic].

tionale of *Hanna v. Plumer*, 380 U.S. 460 (1965). *See* 3B *Moore's Federal Practice*, ¶23.02[5], pp. 23-79.

Defendant's motion to deny class action status to this case is denied.

IV. DISCOVERY ISSUES

Defendant has moved for a stay of discovery and has objected to discovery on the grounds that it will prevail on its motion to dismiss or for summary judgment and that discovery would therefore be unnecessary. Since the Court has ruled against defendant on these contentions, it will deny defendant's discovery motions which are based on the same grounds.

Defendant has also objected to discovery on grounds of work-product privilege, attorney-client privilege, relevance, and undue burden. All of these objections have been stated as generalities and without any factual showing. The work product privilege requires such a showing before it will be recognized. *Coastal Corporation v. Duncan*, 86 F.R.D. 514, 522 (D. Del. 1980). The proper assertion of the attorney-client privilege requires an affidavit identifying the documents and circumstances which would justify the recognition of the privilege. *Coastal Corporation, supra.* at 520-21; *Bar Marine Products Co., Inc. v. Borg-Warner*, 84 F.R.D. 631, 633 (E.D. Pa. 1979); *Virginia Electric & Power Co. v. Sun Ship Building and Dry Dock Co.*, 68 F.R.D. 397, 401 (E.D. Va. 1975). A general assertion that discovery would be irrelevant, burdensome or oppressive is "vague and conclusory" and therefore insufficient. *Scott v. Courtesy Inns, Inc.*, 472 F.2d 563, 564 (5 Cir. 1973); 4A *Moore's Federal Practice*, ¶33.27, pp. 33-164-168. The Court grants plaintiff's motion to compel discovery over these objections.

Plaintiff has also moved the Court to impose sanctions and the expenses of its motion to compel. The Court will hold those requests in abeyance and will give final con-

sideration to them in light of the ability of the parties to proceed with discovery from this point on without undue delay and in accordance with the Federal Rules of Civil Procedure. The Court does order that defendant reply to plaintiff's interrogatories and produce the documents requested in Augusta within twenty days of the *date* of this order.

IV. CONCLUSION

The Court denies defendant's motion for summary judgment, motion to dismiss, motion to deny class action certification, and motion for a stay of or protective order from discovery. The Magistrate's denial of a stay of discovery is affirmed.

The Court grants plaintiff's motion to compel discovery, and orders defendant to answer interrogatories and produce documents within twenty days. Ruling is reserved on plaintiff's motion for sanctions or expenses.

ORDER ENTERED at Augusta, Georgia, this 15th day of January, 1985.

/s/Dudley H. Bowen, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

RICHARD DOYLE,	*	CIVIL ACTION
	*	CV184-180
Plaintiff	*	
	*	
vs.	*	
	*	
SOUTHERN GUARANTY CORPORATION,	*	
	*	
	*	
Defendant	*	

Filed
February 13, 1985

ORDER

Before the Court is defendant's motion to amend the order of January 15, 1985, so as to allow application for interlocutory appeal. The Court GRANTS the motion in part and DENIES the motion in part. The motion is denied to the extent that it seeks a stay of the proceedings in this Court.

The order of January 15, 1985, is hereby amended to include the following paragraph:

> The Court is of the opinion that this order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.
> ORDER ENTERED at Augusta, Georgia, this 13th day of February, 1985.
>
> /s/ Dudley H. Bowen, Jr.
> UNITED STATES DISTRICT JUDGE

APPENDIX "F"

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-8187

D.C. Docket No. 184-180

RICHARD DOYLE,

Plaintiff-Appellee,

versus

SOUTHERN GUARANTY CORPORATION,

Defendant-Appellant.

No. 85-8297

D.C. Docket No. 184-204

JIMMY E. WOOD,

Plaintiff-Appellee,

versus

FORT WAYNE MORTGAGE CO.,

Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Georgia

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Before RONEY, Chief Judge, CLARK, Circuit Judge, and FAIRCHILD*, Senior Circuit Judge.

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*Honorable Thomas E. Fairchild, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District court in these causes be and the same are hereby, AFFIRMED; and that these causes be and the same are hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 5, 1987
For the Court: Miguel J. Cortez, Clerk
ISSUED AS MANDATE: JUNE 30 1987
By: /s/David Maland
Deputy Clerk

APPENDIX "G"

IN THE UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

JIMMY E. WOOD	)	CIVIL ACTION
Plaintiff,	)	File No. 184-204
	)	
vs.	)	
	)	
FORT WAYNE MORTGAGE COMPANY	)	
Defendant	)	

AFFIDAVIT OF LOUIS C. GASPER

I, Louis C. Gasper, being duly sworn, do hereby state:

1. I am Executive Vice President of the Government National Mortgage Association (hereinafter "GNMA"), a wholly owned government corporation within the Department of Housing and Urban Development (hereinafter "HUD"). I have performed the duties of chief operating officer of GNMA since February 19, 1985. Before I assumed my current position, I was Executive Assistant to the President of GNMA. I served in this capacity from August 1981 to February 19, 1985. Between March 1981 and August 1981, I was an economist for the United States Senate Committee on Finance. Between 1975 and 1981, I was the minority staff economist for the United States House of Representatives Committee on Banking, Finance and Urban Affairs. Between 1973 and 1974, I was president of a financial analysis firm. Between 1968 and 1973, I was an assistant professor of economics at the University of Arizona in Tucson. I received my Ph.D. in economics from Duke University in 1969.

2. In my capacity as Executive Vice President of GNMA, I am responsible for and am fully familiar with the operation of the GNMA Mortgage-Backed Securities Program (the "MBS Program") authorized under Section 306(g) of the National Housing Act, as amended, 12 U.S.C. 1721(g), and implemented through regulations published at 24 CFR 390 and by the GNMA I and GNMA II Mortgage-Backed Securities Guides.

3. The purpose of the MBS Program is to provide a security that attracts capital investment into housing. Traditionally, many investors have preferred not to hold federally-insured or guaranteed mortgages which are usually for moderate income families acquiring lower-priced housing. Their reluctance has been based on the small denominations, comparative risks, paperwork, cumbersome servicing requirements and legal complexities of mortgage ownership. To circumvent these obstacles to investment in the housing sector, Congress enacted legislation permitting private lenders to issue securities backed by groups, or pools, of mortgages insured by the Federal Housing Administration (FHA) or guaranteed by the Veterans Administration (VA) or the Farmers Home Administration (FmHA). However, as the Federal Insurance or guaranty alone does not cover 100% of the loss incurred due to a default under a mortgage, Congress authorized GNMA to guarantee the timely payment of principal and interest on the securities and backed this guaranty by the pledge of the full faith and credit of the United States Government.

4. Mortgage-backed securities are created through a process that begins when a financial institution, generally a mortgage banker, applies to GNMA for approval to issue securities. Mortgage bankers generally are thinly capitalized and need to borrow to fund their operations. They normally do not retain mortgages for their own account. If a first-time applicant is an FHA-approved mortgagee in good standing and a GNMA or FNMA servicer, the most important criterion for approval is the issuer's net worth.

If GNMA grants a commitment to guarantee securities, the issuer borrows money from a so-called warehouse lender and proceeds to originate or acquire a pool of FHA insured or VA or FmHA guaranteed mortgage loans to provide the base and backing for the securities. The issuer is required to obtain a document custodian to maintain possession of the mortgages and other loan documents. The issuer must also establish custodial accounts for the collection of both principal and interest and the mortgagors' advance payments of taxes and insurance premiums. Upon receipt of appropriate confirmation that the required documents have been deposited with a document custodian and the appropriate accounts have been established, GNMA approves the issuance of securities, which are sold over-the-counter in denominations of $25,000 or more.

5. The relationship between GNMA and the issuer is contractual and is established when the issuer signs the guaranty agreement for the particular pool for which securities are to be issued. This is prior to the issuance of securities. Once securities are issued, the issuer services the pooled mortgages and performs the other pool administration functions prescribed in its guaranty agreement with GNMA. Breaches of the agreement which constitute an event of default by the issuer are enumerated in Article 8 of the agreement.

6. The combination of a security based on federally-insured or guaranteed mortgages and backed by the full faith and credit of the United States Government has resulted in a high yield, and virtually risk-free investment that has proven to be extremely popular. During the first year of the MBS Program (1970), GNMA approved the issuances of approximately $470 million in mortgage-backed securities. Today, the cumulative amount of securities issued has reached over $220 billion. The securities have become so popular because the MBS Program makes it unnecessary for securities holders to bear the traditional burdens associated with ownership of whole mortgages. In

addition, the Program provides sufficient income, through servicing fees, to the issuers of the securities to make it worthwhile for them to originate and service the loans for the life of the mortgage pools. By protecting the quality of mortgage-backed securities as an investment through the contractual obligations it imposes upon the issuers, GNMA assures the continuation of federally-insured or guaranteed mortgages for individuals purchasing homes.

7. The MBS Program is of critical importance to moderate income families. The Program provides over two-thirds of the funds made available for single-family mortgages insured by FHA. Described as the most important innovation in the secondary mortgage market in the past 40 years, the MBS Program has helped over the past 15 years to provide the funds necessary to house millions of American families that would have found it difficult to qualify for conventional loans.

8. The MBS Program and its success is not limited only to securities backed by pools of single-family mortgages. The Program includes securities which are backed by manufactured home loans, project loans, construction loans, graduated payment mortgages, growing equity mortgages and adjustable rate mortgages.

9. An issuer of GNMA securities backed by manufactured home loans is responsible for originating or acquiring eligible loans, creating a pool of such loans to be held by a custodian, issuing the securities, arranging for the marketing of the securities, servicing the loans in the pool, administering the securities outstanding and making the full and timely payment of all amounts due to securities holders. The issuer must be an FHA-approved Title I lender in good standing.

10. Each loan in a pool must be secured by a manufactured home unit or by a manufactured home unit and a developed manufactured home lot acquired in a single transaction. Each pool must have an aggregate principal

balance of at least $500,000 as of the date of issue. Loans placed in pools must, among other things, have been accepted for insurance by FHA under Title I of the National Housing Act, or have been accepted for guaranty by the VA under chapter 37 of title 38 of the United States Code.

11. The securities issued must be modified pass-through mortgage-backed securities. These require the issuer to pay to the securities holders interest at the rate shown on the securities, scheduled principal due from the borrowers whether or not it is received by the issuer and any principal prepayments or other early recoveries of principal.

12. GNMA has guaranteed approximately $4.7 billion insecurities backed by manufactured housing loans, with approximately $4.6 billion still outstanding. Since the inception of the program, over 992,000 FHA-insured manufactured housing loans and 702,000 VA-guaranteed manufactured housing loans have been placed in GNMA-guaranteed MBS pools. This represents over 90 percent of all such loans.

13. In Georgia, possible penalties for each loan originated without compliance with the Bank Board's consumer protection requirements include (1) the payment of twice the total scheduled finance charge; (2) the payment of a fixed penalty per loan, i.e., $1,000; and (3) the forgiveness of all or a portion of the finance charge. If a significant number of loans were involved, each alternative would significantly increase the occurrence of issuer default under the GNMA MBS Program because of the depletion of the issuer's net worth. The usury finding in itself would void the FHA insurance or the VA guarantee thus rendering the loans ineligible to continue in GNMA pools. The issuer would have to buy the loans out of the pools by paying the face amount to the security holders from the issuers own funds. The loans themselves would be unsalable as they no longer carried a finance charge and were neither FHA-insured or VA guaranteed. If the issuer de-

faulted, GNMA would have to buy the loans out of the pools and terminate them prematurely.

14. When an issuer defaults, GNMA takes control of the MBS pools and assumes the responsibilities of the defaulting issuer. This includes making the required monthly payments to the security holders. GNMA attempts to sell the pools to a substitute issuer and resume its role as guarantor. However, in Georgia, GNMA's ability to sell pools would be greatly hampered, if not destroyed. It would appear probable that pools would be decimated due to the required buy out by GNMA of loans which, as has been stated, would not be saleable. GNMA would nevertheless have to pay the face amount of the loans to the security holders. Problems with a few pools could seriously affect GNMA's assets. The MBS Program could be turned from a heretofore efficient and profitable Government program into a program with significant monetary problems.

I affirm under penalty of perjury that the following is true and correct to the best of my knowledge and belief.

/s/Louis C. Gasper
Louis C. Gasper
Executive Vice President
Government National Mortgage
Association

Subscribed and sworn to me before this 28 day of February 1985.

My commission expires April 14, 1987.

/s/Gertrude C. Brown
Notary Public

APPENDIX "H"

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

December 16, 1983

OFFICE OF THE ASSISTANT SECRETARY FOR HOUSING FEDERAL HOUSING COMMISSIONER — TI-352

TO: ALL APPROVED TITLE I LENDING INSTITUTIONS

ATTENTION: Installed Loan Department

SUBJECT: Legislative changes covering Title I interest rates

Section 404 of the Housing and Urban-Rural Recovery Act of 1983 (Public Law 98-191) (the 1983 Act), which was signed by the President on November 39, 1983, repealed HUD's authority to establish maximum interest rates for Title I loans and provided that insured loans shall bear interest at a rate agreed upon between the borrower and the financial institution. The statutory changes was effective upon enactment.

The statutory change is mandatory and self-executing. It both removed the Secretary's statutory authority to establish a maximum rate and added statutory provisions, effective upon enactment, that directly conflict with the administrative imposition of interest rate limitations. Accordingly, the maximum interest rate provisions in the current program regulations are contrary to law and have no force.

HUD prohibitions against the charging of discount points to borrowers under Title I were an integral part of the

administered interest rate structure. The restrictions on discount points assured that borrowers were not paying an effective interest rate in excess of the established maximum interest rate. Since the clear intent of the 1983 Act is to free the interest rate in Title I transactions from administrative restrictions, continuation of such restrictions on the payment of discount points by borrowers would be inconsistent with and would frustrate that intent. Accordingly, the Department considers that its regulatory prohibitions against a Title I borrower paying discount points have been superseded by statute.

Effective immediately, therefore, lenders, sellers, and buyers may negotiate interest rate and discount point provisions which reflect the market interest rate at the time of loan approval. Borrowers also may pay a commitment fee to guarantee availability of the terms for a specific period of time. However, the current limitation of 1% on a loan origination fee for manufactured housing loans remains in effect.

If the financial requirements on borrowers are increased after loan approval but before loan disbursement, the borrower must be re-evaluated from a credit standpoint.

We believe that this major deregulatory action, enacted by Congress at HUD's request, will benefit sellers, borrowers, and lenders. We emphasize, however, that the statutory change affects only the unilateral imposition of interest rate ceilings by HUD. It does not disturb arrangements already agreed upon among sellers, borrowers, and lenders.

While the statutory change is immediate, adjustments to the market interest rate structure by parties to Title I loan transactions should occur without disruption. During the transition period, we urge all Title I lenders to continue to act consistently with expectations already created regarding transactions initiated before the statutory change.

Lenders also are cautioned to follow all applicable Federal and State disclosure requirements as well as any State or local limitations on maximum interest rates and discounts.

Sincerely,

/s/Maurice L. Barksdale
Maurice L. Barksdale
Assistant Secretary for Housing-
Federal Housing Commissioner

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

OFFICE OF THE ASSISTANT SECRETARY FOR HOUSING-FEDERAL HOUSING COMMISSIONER — TI-352 (Supplement)

TO: ALL APPROVED TITLE I LENDING INSTITUTIONS
Attention: Installment Loan Department

SUBJECT: Clarification of Legislative Changes Covering Title I Interest Rates

This supplemental letter is issued in response to numerous inquiries we have received on Title I letter-352 (TI-352), dated December 16, 1983, concerning the repeal of HUD's authority to establish maximum interest rates for Title I loans.

1. State Usury Laws

The last paragraph of TI-352 states that "lenders also are cautioned to follow. . .any State or local limitations on maximum interest rate and discounts." Section 404 of the Housing and Urban-Rural Recovery Act of 1983 (Public Law 98-181), which repealed HUD's authority to establish maximum interest rates for Title I loans, made *no change* in the existing law governing Federal preemption of State usury laws. Accordingly, the reference in TI-352 to State usury laws was intended as a reference only to States which have acted to override Federal preemption.

It is the responsibility of each Title I lender to determine whether States in its lending area have overridden the Federal preemption, and if so, each lender is responsible for assuring that none of its Title I loans violates State usury law limitations on the rate or amount of interest, discount points, finance charges or other charges. A loan

which violates the State usury law in a State which has overridden Federal preemption is not eligible for insurance under Title I.

More detailed information is set forth in the attachment to this letter.

2. Fixed Interest Rate

All loans must be originated at a fixed interest rate.

If you have any questions, please contract Mr. William Halpern, Director, Title I Insurance Division, Washington, DC 20410, phone (202) 755-6680.

Sincerely,

/s/Maurice L. Barksdale
Maurice L. Barksdale
Assistant Secretary

Attachment

Attachment to TI-325 Supplement

Federal Preemption of State Usury Laws

There are two pertinent provisions of Federal law which preempt State usury laws:

> Section 529 of the National Housing, 12 USC 1735f-7. This applies Federal preemption to "any loan, mortgage, or advance which is insured under Title I or II of [the National Housing] Act."
>
> Section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 USC 1735f-7 note. This applies Federal preemption with respect to loans insured by HUD which are "secured by a first lien on residential real property. . .or by a first lien on a residential manufactured home."

Both statutes permit States to override these preemption provisions. Under the Depository Institutions Deregulation and Monetary Control Act of 1980, this ability of the States to override with respect to the rate or amount of interest was limited to the period commencing on April 1, 1980 and terminating on March 31, 1983. In any case in which both preemption provisions are applicable, such as Title I manufactured home loans, the State must override both provisions. In the case of a property improvement loan which is not secured by a first lien, the Federal preemption is limited to section 529 of the National Housing Act, and therefore only it need be overridden.

In summary:

> In any State which has not acted to validly override Federal preemption of State usury laws, State law limitations on the rate or amount of interest, discount points, finance charges or other charges are not applicable.

To the extent that any State has validly overridden Federal preemption, State law limitations must be followed.

APPENDIX "I"

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

OFFICE OF THE ASSISTANT SECRETARY FOR HOUSING-FEDERAL HOUSING COMMISSIONER

APR 1 - 1985

Richard I. Peyster, Esq.
National Manufactured Housing
Finance Association
1575 Eye Street, N.W. Suite 350
Washington, DC 20005

Dear Mr. Peyster:

This refers to your letter of February 21, 1985 requesting clarification of HUD letter TI-352 (Supplement), dated March 2, 1984, particularly with regard to the following statement contained therein:

> In any case in which both preemption provisions are applicable, such as Title I manufactured home loans, the State must override both provisions. In the case of a property improvement loan which is not secured by a first lien, the Federal preemption is limited to section 529 of the National Housing Act, and therefore only it need be overridden.

Specifically, you have asked whether a lender, to charge an interest rate in excess of that permitted by applicable State law, must comply with §501 of the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. §1735f-7 note, (hereinafter, the Deregulation Act), and the implementing regulations of the Federal Home Loan Bank Board published in 12 CFR 590.4, or

whether the lender need only comply with the FHA Title I manufactured home loan program regulations in 24 CFR Part 201, and thus fall within the scope of §529 of the National Housing Act, 12 U.S.C. §1735f-7.

Section 529 of the National Housing Act, which was enacted in 1979, and §501 of the Deregulation Act are similar in that they both permit interest rates on insured manufactured home loans to exceed the maximum interest rate prescribed by law in any State. The two provisions differ in that under §529 of the National Housing Act the only requirement is that a manufactured home loan must be insured (and thus in compliance with the Title I regulations), whereas under §501 of the Deregulation Act the manufactured home loan must be insured and must comply with the Federal Home Loan Bank Board's regulations cited above. The two provisions also differ with regard to State override of the Federal preemption.

The purpose of HUD letter TI-352 (Supplement) was to inform Title I lenders that although §404 of the Housing and Urban-Rural Recovery Act of 1983, P.L. 98-181, repealed the Secretary of Housing and Urban Development's authority to prescribe maximum interest rates for Title I loans, and permitted insured loans to bear whatever rate is agreed to by the lender and the borrower, §404 did not constitute a Federal preemption of State usury laws. Thus, for a Title I loan to bear an interest rate in excess of that permitted by State law (hereinafter, preemptive interest rate), property improvement lenders whose loans are secured by first liens on the improved property and manufactured home lenders may charge that rate pursuant to either §529 of the National Housing Act or §501 of the Deregulation Act; whereas property improvement lenders whose loans are secured by junior liens could charge such rate only pursuant to §529 of the National Housing Act.

It was then, and is now, this Department's interpretation of the two preemption laws that they are separate

and independent of each other, and that if a manufactured home lender can charge a preemptive interest rate pursuant to §529 of the National Housing Act it need not rely upon §501 of the Deregulation Act, and thus need not comply with 12 CFR 590.4. On the other hand, a preemptive interest rate charged pursuant to §501 of the Deregulation Act also meets the criteria for reliance upon §529 of the National Housing Act. However, if a State acts to override the Federal preemption, then lenders must ascertain whether preemption may still be available. For example, §529(b) of the National Housing Act states an override occurs if a State enacts a provision of law after the effective date of §529 which limits the rate or amount of interest, discount points, or other charges on a manufactured home loan. There is no time limit as to when a State can take such action to override the Federal preemption. On the other hand, the ability of a State to override the §501 preemption is more circumscribed, because the State must do more than limit the rate or amount of interest, discount points, or other charges on the loan; the State must either adopt a law or certify that the voters of the State have voted in favor of a provision which states explicitly and by its terms that it does not want the provisions of §501(a)(1) to apply in that State (see §501(b)(2)). In addition, the States could only do the foregoing during a 3-year period, which expired on March 31, 1983.

Set forth below are various scenarios, based upon the foregoing discussion, which describe the rights of manufactured home lenders as a result of various State override actions:

1. a. State Action: During the above-referred 3-year period, a State enacts a law which limits the rate or amount of interest, discount points, or other charges on a manufactured home loan, but does not explicitly and by its terms state that the provisions of §501(a)(1) of the Deregulation Act will not apply.

b. Legal Consequences: The State has overridden §529 of the National Housing Act.

c. Rights of Lenders: Title I manufactured home lenders may thereafter charge preemptive interest rates only pursuant to §501(a)(1) of the Deregulation Act.

2. a. State Action: During the 3-year period, a State enacts a law which explicitly and by its terms states that the provisions of §501(a)(1) of the Deregulation Act will not apply, but does not limit the rate or amount of interest, discount points, or other charges on a manufactured home loan.

b. Legal Consequences: The State has overridden §501(a)(1) of the Deregulation Act.

c. Rights of Lenders: Title I manufactured home lenders may thereafter charge preemptive interest rates only pursuant to §529 of the National Housing Act.

3. a. State Action: During the 3-year period, a State enacts a law which explicitly and by its terms states that the provisions of §501(a)(1) of the Deregulation Act will not apply and also limits the rate or amount of interest, discount points, or other charges on a manufactured home loan.

b. Legal Consequences: The State has overridden both sections.

c. Rights of Lenders: Title I manufactured home lenders thereafter may not charge interest rates in excess of the maximum rate authorized by State law.

4. a. State Action: After March 31, 1983 a State enacts a law which limits the rate or amount of interest, discount points, or other charges on a manufactured home loan.

b. Legal Consequences: The State has overridden §529 of the National Housing Act.

c. Rights of Lenders: Title I manufactured home lenders may charge preemptive interest rates only pursuant to §501(a)(1) of the Deregulation Act.

We hope that the foregoing discussion clarifies the matter to your satisfaction.

Sincerely,

/s/Shirley McVay Wiseman
Shirley McVay Wiseman
General Deputy Assistant
Secretary for Housing-Federal
Housing Commissioner

FILED
OCT 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-383

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FORT WAYNE MORTGAGE COMPANY,
Petitioner,

v.

JIMMY E. WOOD,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

In the period of late November, 1979 through March of 1980, the 96th Congress passed three laws pertaining to preemption of State finance charge limits for mobile home installment purchase contracts or loans. Each of these laws contained provisions whereby a State could elect to cancel or override Federal preemption. The question presented in the present petition is whether the override provisions for FHA/VA insured mobile home contracts will be construed to require State action beyond the wording of the statute, the intent of Congress, or the interpretation of the agency charged with its administration.

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IN THE

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OCTOBER TERM, 1987

No. 87-383

FORT WAYNE MORTGAGE COMPANY,

Petitioner,

v.

JIMMY E. WOOD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION

STATEMENT OF THE CASE

A. Introduction.

Generally during the time period of April 1980 through March of 1983, companies financing mobile home purchases in certain States were required to meet state limitations on finance charge rates or else comply with one of three Federal statutes allowing the preemption of State limits on finance charges. The present case involves a finance company which charged the higher rates but did not use contracts which qualified for any Federal preemption. The fi-

nance company comes to this Court seeking an artificial interpretation of the FHA/VA preemption statute which would sanction otherwise illegal conduct.

The question presented does not raise a constitutional issue. It is not an issue upon which there has been a split in the circuits. In view of the limited number of mobile home contracts affected by the Court of Appeals' decision, and in view of the general inapplicability of Federal preemption since 1983, the petition does not present an important question of Federal law of sufficiently general application to warrant review by this Court.

B. Statement Of The Facts.

The statement of facts presented by petitioner is accurate but incomplete. To supplement those facts, it should be noted that the finance charge on the Wood mobile home contract equated to an annual APR percentage rate of 18.5%. The law in Georgia at the time of the contract permitted a 10% add-on finance rate equivalent to 14.84% APR on a 15 year contract. (O.C.G.A. Section 10-1-33). Over the life of the contract, plaintiff would be required to pay $10,387.60 more than permitted by Georgia law.

It should also be noted that Fort Wayne Mortgage financed mobile home purchases on a conventional basis, as well as insured by FHA/VA, and that conventional purchases are included within the class in this case. As is true of the FHA/VA mobile home contracts, the conventional mobile home contracts also fail to comply with any of the available Federal preemption statutes and exceed the State limits on

finance charges. See Appendix B for a copy of such a contract included in the class in this case.

C. Proceedings Below.

Respondent essentially agrees with the statement of proceedings below. The Eleventh Circuit opinion at issue is reported as *Doyle v. Southern Guaranty Corporation*, 795 F.2d 907 (11 Cir. 1986), and the decision of the Georgia Supreme Court is reported as *Southern Guaranty Corporation v. Doyle*, 256 Ga. 790, 353 S.E.2d 510 (1987). The decision of the Eleventh Circuit adopting the Supreme Court's response to the certified question is at 818 F.2d 754 (11 Cir. 1987).[1]

D. Reasons For Denying The Writ.

Petitioner's claim is particularly inappropriate for a writ of certiorari. Petitioner asks this Court to overturn a unanimous panel opinion of the Eleventh Circuit where there is no contrary authority to support petitioner's contentions. Secondly, petitioner advances a construction of the 1979 FHA/VA preemption stat-

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[1] It is incorrect for the finance company to refer to this case as involving interest rates and usury. It must be noted that the Georgia Motor Vehicle Sales Finance Act (GMVSFA), O.C.G.A. Section 10-1-30, *et seq*, is not a "usury" statute and nothing contained in that statute governs the rate of interest that can or cannot be charged in connection with any "loan." It has long been the law in Georgia that a conditional sales contract or retail installment sales contract involving the time-price differential does not involve usury or the assessment of interest. *E. Tris Napier Co. v. Trawick*, 164 Ga. 781, 782, 139 S.E. 552 (1927); *Rigdon* v. Walker Sales & Service, Inc., 161 Ga.App. 459, 461, 288 S.E.2d 711 (1982). Thus, in dealing with the issues before the Court, the terms "usury" and "interest" and "loan" have nothing to do with the Georgia statute involved, and except in general usage, are misnomers.

utes that is contrary to that of the agency responsible for the administration of those laws. The arguments of petitioner do not have merit or raise any important issue of wide applicability.

Petitioner is pursuing this action with the simple hope of obtaining a reprieve from having violated the finance rate limits in Georgia and continuing to unlawfully collect from this class of mobile home purchasers a rate of return higher than any long-term interest rates existent in this country.

ARGUMENT AND AUTHORITIES

A. Introduction.

Before surveying the statutes at issue in this case, respondent submits that it is important to recognize at the outset the disparity of bargaining power in the context of mobile home purchases. Contracts of adhesion are the rule.[2] This area of commerce is marked by a

> history of abuse associated with mobile home lending. In large part, these abuses have resulted from the fact that mobile homes are usually financed under motor vehicle and retail installment sale laws, which allow lending practices that are not appropriate for loans as large as that required in a mobile home sale. As personalty, mobile homes have been also subject to summary repossessions in the event of default.

FHLBB General Counsel Op. No. 1981-2, *Fed. Banking L.Rep.* (CCH) 83,002 (July 28, 1981). Moreover,

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[2] Rakoff, *Contracts of Adhesion*, 96 Harv.L.Rev. 1174, 1177 (1983).

as a group, mobile home credit buyers are more vulnerable than the average homeowner because they are poorer and less well educated. U.S. Dept. of Commerce, Bureau of the Census, *Annual Housing Survey, Part A,* (1974).

Mobile home credit buying is dominated by poorer families. In 1980, 400,000 families were mobile homeowners with incomes below the poverty line. U.S. Dept. of Commerce, Bureau of the Census, *U.S. Metropolitan Housing Characteristics*, Table A-8 (1983). Fully 35% of mobile homeowners have incomes under $10,000.00. *Ibid.* About 25% of mobile homeowners are senior citizens, and young married couples comprise another 25%, FTC, *Staff Report on Mobile Home Sales & Service* at 37-39 (1979). More than for homeowners overall, 21% of mobile homeowners have less than a sixth grade education, and over half the mobile homes are located outside of metropolitan areas, *id.*, where there is frequently less access to consumer education and legal assistance.

When high finance charge rates are used to finance mobile home purchases (as when state limits are preempted) the debt is harder to manage and families are more likely to become overextended. The frequency of delinquency increases, and with it the occasion for collection abuses. When mobile homeowners are late in making a payment, it is often for reasons beyond their control. The FTC found that like other consumer borrowers, lapses of income from unemployment, uninsured or underinsured illness or injury, divorce, termination or reduction in pensions or other benefits, and unmanageable expenses like heating bills cannot be avoided. FTC, *Credit Practices Rule State-*

ment of Basis and Purpose and Regulatory Analysis, 49 Fed.Reg. 7740, 7744, note 27 (1984).

Because of these disadvantages, mobile homeowners are disproportionately victims: they are easier to overawe, less able to understand or defend their rights and easier to intimidate. As the Presiding Officer in the FTC hearings on mobile homes summarized it:

> It is also clear that consumers purchasing mobile homes rely entirely on the expertise of both the dealer and the manufacturer to handle the sometimes complicated details of the entire transaction.

FTC, *Report of the Presiding Officer on Proposed Trade Regulation Rule: Mobile Home Sales & Services*, at 31 (1979). They were also found to be less able to afford lawyers to discern their rights or to seek legal advice. *Id.* at 31, 38.

Congress undoubtedly had these factors in mind when it considered preemption for mobile home contracts in November and December of 1979 and March of 1980. Contrary to the impression that the finance company would leave from its petition, interest rates were not so high and availability of funds not so severe that finance companies were allowed to set rates for mobile home purchases free from consumer protection provisions. Each preemption scheme which will be analyzed in this brief contained some degree of consumer protection not required for preemption of conventional home lending rates.[3]

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[3] Consumer protection for housing is especially important. One who wrongfully loses his home suffers "irreparable injury." If a person loses his home to repossession or foreclosure, then he

B. The Three Federal Preemption Statutes.

The first preemption statute at issue was the VA preemption provision enacted as Section 401 of the Veterans' Disability Compensation and Survivor's Benefit Amendments of 1979, Pub.L. No. 96-128, 93 Stat. 986-87, approved November 28, 1979. It is as follows:

> If, under any law of the United States, loans and mortgages insured under title I or title II of the National Housing Act are exempt from the application of the provisions of any State constitution or law (1) limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved by lenders, (2) restricting the manner of calculating such interest (including prohibition of the charging of interest on interest), or (3) requiring a minimum amortization of principal, then loans guaranteed or insured under this chapter are also exempt from the application of such provisions.

38 U.S.C.A. Section 1828 (as amended 1981).

> Under this provision, wherever loans insured by the Federal Housing Administration (FHA) are exempted from a State anti-usury provision by a provision of the National Housing Act, ... VA loans would also be exempted. In this way, the coordination of Federal policy regarding the exemption of VA and FHA home loans from State anti-usury provisions would be assured.

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must often "live in inadequate, often health endangering housing;" hence, the irreparable injury. *Johnson v. U.S. Dept. of Agriculture*, 734 F.2d 774, 789 (11 Cir. 1984).

S.Rep. No. 260, 96th Cong., 1st Sess. 29, *reprinted in* 1979 U.S. Code Cong. & Ad. News 1894, 1915.

The FHA preemption statute was enacted next some three weeks later on December 21, 1979. It was enacted as Section 308 of the Housing and Community Development Amendments of 1979, Pub.L. No. 96-163, 93 Stat. 1101, 1113-14. The statute is codified at 12 U.S.C.A. Section 1735f-7, as follows:

> (a) The provisions of the constitution of any State expressly limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved by lenders and the provisions of any State law expressly limiting the rate or amount of interest, discount points, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, or advance which is insured under subchapter I or II of [the National Housing Act].
>
> (b) The provisions of subsection (a) of this section shall apply to loans, mortgages, or advances made or executed in any State until the effective date (after December 21, 1979) of a provision of law of that State limiting the rate or amount of interest, discount points, or other charges on any such loan, mortgage or advance.

Although this section does not refer expressly to mobile home loans, the National Housing Act includes certain mobile home loans within the class of insurable loans. 12 U.S.C.A. Section 1703.

For ease of reference and because these two statutes operated in tandem, they will be referred to as FHA/VA preemption.

The third federal preemption statute is Section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.L. No. 96-221, Section 501(c), 94 Stat. 161, codified at 12 U.S.C.A. Section 1735f-7 (note), approved on March 31, 1980. For ease of reference this will be referred to as DIDMCA. In DIDMCA, Congress provided that preemption would not exist for any credit sale secured by a manufactured home unless the "terms and conditions relating to such loan, mortgage, credit sale, or advance comply with the consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board." Section 501(c). The statute went on to provide that the FHLBB regulations shall include restrictions on balloon payments, prepayment penalties, late charges, foreclosure, repossession or acceleration without a thirty day notice to the purchaser, refunds of finance charges by at least the actuarial method, and such other provisions as the FHLBB may prescribe. *Id.*

It is especially important to note that DIDMCA preemption applied to all "federally related mortgage loans" as broadly defined in 12 U.S.C.A. Section 1735f-5(b). Thus DIDMCA preemption was available for VA insured transactions such as the mobile home purchase contract by respondent Wood. *Doyle,* 795 F.2d at 911.

The FHLBB regulations enacted pursuant to DIDMCA are found at 12 CFR Section 590.4.[4]

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[4] The Court of Appeals pointed out that consumer protections under the FHA/VA schemes and DIDMCA while not identical, address similar concerns and overlap substantially. 795 F.2d at 912. Probably the primary difference between these schemes,

C. The Fort Wayne Contracts Vis-a-vis The Three Statutes.

The financing contract between Fort Wayne and the named plaintiff—Jimmy Wood—is of the VA variety. As the Court of Appeals noted and as the parties agree, the VA preemption piggybacks the preemptions under the FHA statute. Thus, the inquiry faced by the district court and the Court of Appeals was whether the finance charge rate, which exceeded Georgia law on this contract, was permissible either under the FHA/VA scheme or under DIDMCA.

Plaintiffs argued in the courts below that once DIDMCA became law, it provided the only means for preempting state limits on mobile home finance rates. This was based on the fact that DIDMCA was the first statute to specifically mention preemption for "mobile homes", as the earlier VA and FHA preemptions were for all loans or contracts in general made under the VA or FHA programs. Also, DIDMCA preemption for mobile home purchases included all "federally related mortgage loans", 12 U.S.C.A. Section 1735f-5(b), including VA and FHA transactions. Since DIDMCA gave more complete protection to mobile home purchasers from creditor abuse, and since DIDMCA was the latest expression of Congress and the only specific legislation mentioning mobile home transactions, it was submitted that this became the only means to federally preempt state law limits. This

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and one not noted by the Court of Appeals, is the protection under DIDMCA which requires mobile home purchasers to be given thirty days prior notice and an opportunity to cure any default before the contract can be accelerated or the mobile home repossessed or foreclosed. DIDMCA Section 501(c)(2); 12 CFR Section 590.4(h)(1), (2).

argument was accepted by the district court,[5] but rejected by the Court of Appeals.[6]

The finance company form contracts at issue in this case clearly did not qualify for DIDMCA preemption. The contract with petitioner Jimmy Wood provided that "if buyer defaults in the payment of the installment or the performance of the other obligations provided herein, the entire balance of the total of payments may be declared immediately due." This was in direct conflict with the DIDMCA requirement of thirty days advance notice and a right to cure. 12 C.F.R. Section 590.4(h). The form contract also imposed late charges on purchasers if a payment was not made within ten days of the due date. The DIDMCA regulations prevented the imposition of late charges until fifteen days had passed. 12 C.F.R. Section 590.4(f)(4).[7] Thus, while the Court of Appeals found that DIDMCA was not the exclusive means to preempt state finance charge limits, it was a means unavailable to this finance company because of the defects in its form contract. This left only the 1979

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[5] See the district court's order at Appendix E to the petition, pages 33a-36a.

[6] *Doyle*, 795 F.2d at 909-912.

[7] As the Court of Appeals put it, "Both the Doyle and Wood contracts permit assessment of a late charge for any payment which is ten days late and do not contain a requirement of notice before acceleration or foreclosure. Under this Court's recent decision in *Quiller v. Barclays American/Credit, Inc.*, 764 F.2d 1400 (11th Cir. 1985) *(en banc), cert. denied,* ___ U.S. ___, 106 S.Ct. 1992, 90 L.Ed.2d 673 (1986), the Doyle and Wood contracts are not entitled to the DIDMCA preemption." 795 F.2d at 911.

FHA/VA preemption as a justification for the high rates charged.[8]

D. The State Override Of FHA/VA Preemption.

Once the Court of Appeals decided that it was not mandatory that FHA/VA mobile home financing contracts comply with DIDMCA, and that the Fort Wayne form contracts did not in fact comply with DIDMCA, it became necessary to determine whether the contracts were eligible for preemption under the FHA/VA statutes. The controlling Code section is at 12 U.S.C.A. Section 1735f-7(b), which is quoted in full at page 8. As the parties agree, if this FHA preemption was still valid for Georgia contracts, it would apply also to VA insured mobile home contracts. If the FHA preemption was no longer available in Georgia, then VA preemption would not be available either. 795 F.2d at 912.

The reason why FHA/VA preemption was not available to justify the high finance charges assessed by Fort Wayne is that the State of Georgia overrode FHA/VA preemption when it considered and reimposed its finance charge limits on mobile home contracts through legislation enacted on March 20, 1980.

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[8] On its non FHA/VA mobile home contracts, the finance company was just as deficient in complying with the required consumer protections. In the McQuaig contract which is Appendix B to this brief, late charges are imposed immediately upon default in violation of 12 C.F.R. Section 590.4(f)(4). Upon any default in payment, the finance company reserves the right to "declare said indebtedness to be immediately due and payable and...have the remedies of a secured party under the Uniform Commercial Code, including without limitation, the right to take possession of the collateral by any lawful means...." This violates § 501(c)(2) of DIDMCA and 12 C.F.R. Section 590.4(h).

On that date, Georgia Laws 1980, page 523, codified at O.C.G.A. Section 10-1-33 became effective. In that Code section, the Georgia legislature revisited the area of finance charges for mobile home contracts, decided to continue to limit the finance charges that could be collected, but increased the finance charges from an 8% to 10% add-on rate. *Id.*[9] Fort Wayne Mortgage argues that the Court of Appeals was in error in finding that Georgia overrode FHA/VA preemption when its legislature imposed those limits on mobile home finance charges without specifically stating that the new limits on finance charges applied to FHA/VA insured transactions. The Court of Appeals opinion sets forth several compelling reasons why petitioner's contention is wrong. Respondent adopts those reasons and amplifies them somewhat in the following.

(a) Petitioner's Argument Rests Upon An Inconsistent Application Of The Preemption Statute.

The effect of 12 U.S.C.A. Section 1735f-7(b) is to remove FHA/VA preemption if a State imposed limits on finance charge rates after December 21, 1979. The finance company argues that the phrase "such loan, mortgage or advance" in subsection (b) requires a State law to specifically mention that the new limit on finance charges applies to FHA/VA insured transactions.

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[9] An add-on rate is one in which the principal (e.g., $10,000) is multiplied by the term of the contract (e.g., 15 years) and then again by the add-on rate per hundred dollars (e.g., $10 per $100 financed). In this example, the permissible finance charge would be $10,000 x 15 x .10 = $15,000. This would then be added to the $10,000 principal for a total of $25,000 to be paid in equal installments over the life of the contract.

The first oddity in this argument is that the preemption of state finance charge limits in subsection (a) of the statute is not premised or dependent upon the existence of State laws specifically worded to apply specifically to FHA/VA transactions. Congress assumed that all such laws would apply to FHA/VA transactions. That same understanding must necessarily apply to subsection (b) and makes it quite rational that Congress would not require a State which imposed new limits on finance charges or interest rates to specifically state that they were to apply to FHA/VA insured transactions.

In the grant of preemption under Section 1735f-7(a) State laws were addressed universally and with the understanding that they applied to transactions under the National Housing Act (FHA/VA). In providing for the preemption to be lifted by a State in 1735f-7(b), it would be extraordinary in the context of the language used for Congress to have intended that non-universal or FHA/VA specific language was required to reimpose state limits.[10]

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[10] The effort to engraft additional meaning on the use of the word "such" in subsection (b) is remindful of the following passage:

> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."
>
> Alice was too puzzled to say anything; ....

Alice Through The Looking Glass, Lewis Carroll, Ch. VI.

(b) If Congress Had Intended The Use Of "Magic Words" By A State Legislature To Override The FHA/VA Preemption, It Knew How To Do So.

"All of the statutes in question were enacted by the 96th Congress in a six month time span. The same House and Senate committees considered both the FHA and DIDMCA statutes." *Doyle*, 795 F.2d at 911. "Congress was already considering this language [DIDMCA] at the time the FHA preemption was enacted." *Id.* at 913.

DIDMCA also contained an override provision but specifically required that the State override legislation "state explicitly and by its terms that such State does not want the provisions of subsection (a)(1) to apply with respect to loans, mortgages, credit sales, and advances made in such State." Section 501(b)(2). The Appeals Court put it so well when it opined that "Congress knew the type of language to use when it intended that state override provisions make specific reference to the federal preemption." 795 F.2d at 913.[11]

Consistent with the understanding that Congress knew how to impose a more specific requirement on the States, is the principle of constitutional jurisprudence that limits on the exercise of powers historically within the province of the States will not be implied unless it is clear that Congress so intended.

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[11] It is an accepted rule of statutory construction that a "change of [statutory] language is some evidence of a change of purpose." *Johnson v. United States*, 225 U.S. 405, 415 (1912). It is "a workable rule of construction, not an infallible guide to legislative intent, and cannot overcome more persuasive evidence." *United States v. Dickerson*, 310 U.S. 554, 561 (1940). *Cf, McElroy v. United States*, 455 U.S. 642, 650, n. 13 (1982).

Milwaukee v. Illinois, 451 U.S. 304, 316 (1981). The regulation of finance charges and interest rates has been recognized as an area of law within the "long-standing authority of States." Comments of Senator Morgan, S.Rep. No. 96-368, Oct. 15, 1979, at 41, *reprinted in* 1980 U.S. Code Cong. & Admin. News, 236, 277; *accord, Doyle,* 795 F.2d at 914.

(c) The Legislative History Belies Any Requirement For Special Language To Override FHA/VA Preemption.

The Court of Appeals concluded that the legislative history "provides no firm guidance," 795 F.2d at 913, but closer analysis indicates that it does. In the House Report, the Committee stated:

> Section 310 of the bill would add a new section 529 to the National Housing Act which would provide that the provision of any State Constitution or law expressly limiting the rate or amount of interest, discount points or other charges which may be charged or received by lenders shall not apply to any loan, mortgage or advance which is insured under titles I or II of the National Housing Act. The section would also provide that this exemption would not apply to such loans, mortgages or advances if a State were to enact such a limitation after the effective date of this section.

H.R. Rep. No. 154, *reprinted in* 1979 U.S. Code Cong. & Admin. News, 2317, 2379. It is obvious that the House committee was referring to the State's general laws limiting finance charge rates, interest, discount points or other charges. It was not referring to an override brought about by some specifically required language as suggested by petitioner.

Similarly, the Senate report states that these federally insured loans "would not be exempt in any state that reinstated its anti-usury provision after the effective date of the new federal law." S.Rep. No. 260, *reprinted in* U.S. Code Cong. & Admin. News 1894, 1917.

With the FHA counterpart, the Senate report referred to override when States reenacted a "usury limit applying to FHA loans." S.Rep. No. 164, 96th Cong., 1st Sess. 33 (1979). The House report spoke of override when a "state may act to subject these FHA instruments to state usury ceilings." H.Rep. No. 154, *supra* at 2340. Since the State laws being preempted were not laws specifically setting rate limits or usury ceilings on FHA loans alone, it is illogical to assume that a State would have to specifically refer to FHA loans to reimpose those limits or ceilings to accomplish the override permitted by Congress.

(d) The Circuit Court Position Is Consistent With The U.S. Department Of Housing And Urban Development's Interpretation Of FHA/VA Preemption.

The trade organization for companies which finance mobile home purchases solicited an opinion letter in 1985 to assist in the defense of the current litigation. There was no doubt considerable chagrin when they realized that the April 1, 1985 letter from HUD General Deputy Assistant, Shirley Wiseman, supported the contentions of the plaintiff concerning override of FHA/VA preemption.

The pertinent conclusion is contained on page 3 of the Wiseman letter which is reprinted at 61a in the appendices to the petition.

> However, if a State acts to override the Federal preemption, the lenders must ascertain whether preemption may still be available. For example, Section 529(b) [12 U.S.C.A. Section 1735f-7(b)] of the National Housing Act states *an override occurs if a State enacts a provision of law after the effective date of Section 529 which limits the rate or amount of interest,* discount points, or other charges *on a manufactured home loan.* There is no time limit as to when a State can take such action to override the Federal preemption. On the other hand, the ability of a State to override Section 501 [*DIDMCA*] *is more circumscribed,* because the State must do more than limit the rate or amount of interest, discount points or other charges on the loan; the State must either adopt a law or certify that the voters of the State have voted in favor of a provision *which states explicitly and by its terms that it does not want the provisions of Section 501(a)(1) to apply in that State....* (emphasis added).

There in a nutshell, the HUD official has contrasted the difference between FHA/VA preemption which is overridden by a state's mere enactment of a law setting finance charge limits and DIDMCA preemption which required specific language to override.

The HUD letter then sets forth examples of how override might occur. The pertinent example for the present case is the one which appears at pages 61a-62a of the appendix to the petition.

> 1. a. State Action: During the above-referred 3-year period, a State enacts a law which limits the rate or amount of interest, discount points,

> or other charges on a manufactured home loan, but does not explicitly and by its terms state that the provisions of Section 501(a)(1) of the Deregulation Act will not apply.
>
> b. Legal Consequences. The State has overridden Section 529 of the National Housing Act.
>
> c. Rights of Lenders: Title I manufactured home lenders may thereafter charge preemptive interest rates only pursuant to Section 501(a)(1) of the Deregulation Act [DIDMCA].

Thus a decision by a state legislature, as was the case in Georgia in 1980, to reenact or to continue to subject mobile home financing to limits on finance charges was an override of FHA/VA preemption. A mobile home finance company could still continue to preempt state laws by complying with DIDMCA and its more extensive consumer protections. The finance company in the present case chose not to give those protections but nevertheless assessed the higher finance charges and thus finds itself in litigation for having violated the limits set forth in Georgia law.

It is well established that courts give deference and "attentiveness to the views of the administrative entity appointed to apply and enforce a statute." *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 565 (1980). "Considerable respect is due 'the interpretation given [a] statute by the officers or agency charged with its administration.'" Id. at 566, *quoting Zenith Radio Corp. v. United States,* 437 U.S. 443, 450 (1978), and other cases there cited. *Ex parte* agency opinions solicited by regulated companies would usually be suspect. But here the opinion is adverse to the supplicant. Thus it follows that the interpretation of the FHA/VA statutes by HUD can be given great weight in this case. The

EDITOR'S NOTE

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HUD interpretation is consistent with a logical reading of the words of the statute, and the logical import of the legislative history. The HUD interpretation is consistent with the notion that Congress intended to make the override of FHA/VA preemption easier to accomplish as it knew that it would soon have DIDMCA in place with the more extensive protections for mobile home purchasers.

(e) Petitioner's Suggested Anomaly Disappears Upon Analysis.

The finance company suggests at pages 17 and 18 of its petition that the Court of Appeals' decision creates "anomalous results." The finance company argues that a reenactment of finance charge or interest limits for mobile homes sales would make a State powerless to avoid overriding preemption "for federally insured loans" even if it did not wish to do so. However, this argument is undermined by the very example cited by the finance company on page 18 of the petition. All the State had to do, as Georgia did in 1979 for conventional loans, was simply provide in any statute that rate limitations would not apply to transactions "insured by the United States or any agency or instrumentality thereof." O.C.G.A. Section 7-4-3(c)(5), 1979 Georgia Laws, page 357. Regardless of whether preemption was available under Federal law, a State was free to simply remove finance charges or interest limits on any category of transaction.

As the Court of Appeals noted, it was consistent with Congressional policy to allow States as much deference as possible in the matter of finance charges and interest rates. When Georgia reinstituted its finance charge limits for mobile home purchases in 1980, it did so in a fashion that was consistent with

the concerns of Congress—Georgia raised the permissible finance charges in response to a higher cost of funds which existed at that time.

(f) Petitioner's Argument Was Made To And Rejected By Congress.

In 1985, the National Manufactured Housing Finance Association, on behalf of Fort Wayne Mortgage Company and others,[12] petitioned the United States Senate to enact legislation codifying the argument which petitioner has made before the Court of Appeals and which it raises in its present petition.[13] The 99th Congress expired without the introduction of any legislation on this subject, and without any action by the Senate committee or the Congress as a whole. While this Court is "chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it." *United States*

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[12] *Mobile Home Usury Preemptions: Hearing before the Subcommittee on Financial Institutions and Consumer Affairs of the Senate Committee on Banking, Housing and Urban Affairs,* 99th Cong., 1st Sess. 220, S. Hrg. 99-1382, p.153 (1985). The report of these hearings will hereinafter be cited as "1985 Senate Hearings."

[13] "The finance companies asked for "a similar direct statement by the Congress that it was its intent in enacting the FHA usury preemption that a state could opt-out of the coverage of the preemption only by the state's affirmative expression of intent to reassert state control with specific reference to such FHA-insured loans, advances and credit sales." 1985 Senate Hearings at 179.

v. Riverside Bayview Homes, Inc., 474 U.S. ___, 88 L.Ed.2d 419, 433 (1985).

E. No Public Good Would Be Served By Creating A Loophole To Validate The Finance Company's Illegal Finance Rates

As is the case with almost all certiorari petitions which come before this Court, the finance company argues that unless its petition is accepted and its view adopted, calamity will befall the nation. In the present petition, the specter raised is that of the collapse of the housing finance industry. Also the finance company portrays itself as an unwary victim of technical legislation. This is utter nonsense.

To fully understand mobile home purchase financing in the early 1980s, one must go back to February of 1980. FHA/VA preemptions with their easy override clauses had been passed in November and December of 1979. Congress was at work on a major overhaul of Federal preemption of State limits on finance charges and interest rates in the legislation that eventually became DIDMCA. The National Manufactured Housing Finance Association, of which Fort Mortgage Company is a member[14], petitioned leaders of Congress for the opportunity to suggest another preemption of State laws limiting finance charges as they applied to mobile home purchases.[15]

In order to induce acceptance of the finance industry request for preemption of State laws, the industry argued that it would move away from contracts giving strong-arm rights to the creditor and would

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[14] 1985 Senate Hearings, p. 153.

[15] Senate hearings at p. 171.

move toward "financing instruments...more like those used in real property mortgage transactions.[16] To "accelerate this development in the market place of such desirable protections", the industry suggested to Congress that preemption from State laws be conditioned upon protections for mobile home purchasers as would be prescribed by the Federal Home Loan Bank Board. (FHLBB). In their testimony to the House committee considering the law, the finance companies noted that loans and sales "*would not qualify* for the exemption" if they failed "to incorporate appropriate purchaser protections."[17] (emphasis added).

Congress accepted the finance company's arguments. In March of 1980, DIDMCA was passed. As noted earlier, the mobile home finance provisions are contained in the Act at Title V, Section 501, codified at 12 U.S.C.A. Section 1735f-7, (note), and conditioned preemption on the use of contracts which give extensive consumer protection benefits.

Section 501(a)(1) of DIDMCA provided that state limits on finance charges in connection with a loan, mortgage or credit sale on a residential manufactured home (mobile home) would be preempted after March 31, 1980. Section 501(c) of the Act provided that the preemption would not apply "to a loan, mortgage, [or] credit sale" on a mobile home "*unless the terms and conditions relating to such loan, mortgage, [or] credit sale*" complied with consumer protection provisions in regulations prescribed by the FHLBB. (emphasis added). In other words, to enjoy preemption

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[16] *Id.* at 205-206.

[17] *Id.* at 207-208.

from State limits on finance charges, the "terms and conditions" of the credit sale had to comply with the regulations. Nothing could be simpler or more straightforward.

House Conference Report No. 96-842 in discussing preemption of finance charges in connection with mobile home loans stated the following:

> *Manufactured home financing is covered by the mortgage usury preemption as long as such financing complies with the consumer protection provisions specified in regulations of the FHLBB.* (emphasis added).

Reprinted in 1980 U. S. Code Cong. & Admin. News, 309. Again the message is clear and unmistakable; if one wants preemption, one must pay the price.

The FHLBB in adopting regulations pursuant to this Act, made it clear that the sale or loan documents had to comply with the consumer protection regulations or else the transaction would be subject to attack under State "usury" laws. Federal Register, May 20, 1980, Vol. 45, p. 31122 and June 30, 1980, Vol. 45, p. 43681.

In the first substantial litigation concerning compliance *vel non* with the requirements of consumer protection in the FHLBB regulations, the Eleventh Circuit Court of Appeals held without dissent that preemption is unavailable to a creditor "if the financing agreement contains express provisions authorizing conduct contrary to the statute or regulations." *Grant v. General Electric Credit Corp.*, 764 F.2d 1404, 1405-06 (11 Cir. 1985) (*en banc*), *cert. den.*, ___ U.S. ___ ; *Quiller v. BarclaysAmerican/*

Credit, Inc., 764 F.2d 1400 (11 Cir. 1985) (*en banc*), *cert. den.*, ___ U.S. ___.[18]

Thus, mobile home finance companies should have known from the very beginning that Congress was allowing continued preemption from state limits on mobile home finance charges only on the condition, suggested by the finance companies, that consumer protections be included in the sale and financing documents. As the finance companies acknowledged during the hearings prior to DIDMCA, a failure to comply with these consumer protections would mean that the underlying transactions would be subject to the remedies of State law. This was repeated in the legislative history by the Congressional committees and by the FHLBB as it adopted the underlying regulations.

It has now developed that a few finance companies have been caught exacting the higher finance charges while preserving collection remedies inconsistent with DIDMCA. Petitioner Fort Wayne is guilty on both its conventional and FHA/VA forms. It never had any intent to protect the consumer, only to collect the high finance charges. That explains why Fort Wayne is so desperate to have a skewed construction of the FHA/VA preemption and invalidate the 1980 Georgia override.

Numerous finance companies and lenders, in drafting their form contracts, have paid specific attention to the "price for preemption" and have specifically

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[18] The Court of Appeals split by votes of 6-5 and 8-3 on whether two particular form contracts were contrary to the regulations. But as to the principle that preemption was not available for a contract authorizing conduct contrary to the regulations, there was no dissent.

granted as terms of the contract the right to notice of default and a contractual right to cure, and have insured that the other terms and provisions of the forms were consistent with the consumer protections required by DIDMCA.[19] The fact of the matter is that only a few finance companies are known to have charged finance charges in excess of those permitted by state law while not meeting the requirements for preemption. These finance companies, whose contracts are in violation of State law, are subject to the remedies provided by State law and arguments concerning the economic consequences to either party are irrelevant.[20]

It is fallacious for the finance company to argue as it does at page 9 of its petition that its excessive finance rate was justified by economic circumstances. The term "prime rate" is an elusive term,[21] and ill-fitted for a long-term mobile home financing contract. The more appropriate gauge is long-term debt instruments. Treasury issues maturing in 1998 were yielding 13.15% during the month in which the Wood/Fort Wayne contract was entered. *Wall Street Journal,* February 23, 1982, p. 52, col. 4. The average contract interest rate on conventional first mortgage

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[19] 1985 Senate Hearings, *supra,* pp. 20, 51-52, 53-54, 55-56, 270-271.

[20] Whether statutes accord with good policy is irrelevant in arriving at the meaning of statutes. "Courts are not authorized to rewrite a statute because they deem its effects susceptible of improvement." *Badaracco v. Commissioner,* 464 U.S. 386, 398 (1984); *accord, Rubin v. United States,* 449 U.S. 424, 431, n. 8 (1981).

[21] *Kleiner v. First National Bank,* 526 F.Supp. 1019, 1021 (N.D. Ga. 1981).

loans for the purchase of single family homes during the calendar year 1982 was but 14.5%. U.S. Dept. of Commerce, Bureau of the Census, *1985 Statistical Abstract of the United States,* 105th Ed., No. 1329. The finance company simply got greedy to lock in 18.5% return over 15 years on the Wood mobile home purchase and did not take care to determine whether or not its form contract complied with any extant federal preemption statute.

It is also misleading for any party to assert that the resolution of the issue at hand will have wide ranging impact. Few mobile home credit contracts are presently being written in reliance on preemption of State usury limits by Federal law. 1985 Senate Hearing, *supra,* at 266. Falling interest rates and changes in State finance and usury laws have reduced the need for preemption of State laws in order to make purchase funds available. Indeed, Georgia has opted-out of both the FHA/VA and DIDMCA preemption schemes.

Of the outstanding mobile home financing contracts across the country, many are transactions that preceded any type of Federal preemption. Many of the transactions were made in the fourteen states that had no usury or finance charge limits or had limits higher than market rates.[22] Also, prior to April, 1983, fifteen states specifically opted-out of the more extensive DIDMCA protections and returned to state-imposed limits and standards.[23] Eight other states

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[22] 1985 Senate Hearings, supra, at pp. 93, 141.

[23] Under DIDMCA Section 501(a)(2) (94 Stat. 162) States were given the opportunity, until April 1, 1983, to override the preemptive provisions of the Act. The following States did so

eliminated finance and usury limits for some or all mobile home transactions.[24]

Not only do the laws of many states not regulate the rates used for mobile home transactions, some

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(the effective dates of the override laws are noted in parentheses): Colo. Rev. Stat. Section 5-13-105 (Supp. 1985) (July 1, 1981); Ga. Code Ann. Section 7-4-20 (Supp. 1985) (Mar. 31, 1983); Hawaii Rev. Stat. Section 478-12 (Supp. 1984) (May 30, 1980); Idaho Code Section 28-49-105 (Supp. 1985) (Mar. 31, 1983); 1980 Iowa Acts ch. 1156, Section 32 (May 9, 1980); Kan. Stat. Ann. Section 16-207a (1981) (May 17, 1980); Me. Rev. Stat. Ann. tit. 9-A, Section 1-110 (Supp. 1985) (May 18, 1983); 1981 Mass. Acts ch. 231, Section 2 (Sept. 2, 1981); Minn. Stat. Ann. Section 47.203 (West Supp. 1986) (June 2, 1981); 1982 Neb. Laws L.B. 623 (July 17, 1982); 1981 Nev. Stat. ch. 668, Section 11 (June 14, 1981); N.C. Gen. Stat. Section 24-2.3 (Supp. 1985) (Mar. 31, 1983); 1981 S.C. Acts No. 6 (Mar. 2, 1981); 1982 S.C. Acts No. 385; S.D. Codified Laws Ann. Section 54-3-15 (Supp. 1984) (Mar 5, 1981); 1981 Wis. Laws ch. 45, Section 50 (Nov. 1, 1981).

[24] See Ariz. Rev. Stat. Ann. Sections 44-1201(A), 44-6002 (Supp. 1985); Cal. Health & Safety Code Section 18039.5 (West 1984); Mont. Code Ann. Section 31-1-241(1) (1985); N.H. Rev. Stat. Ann. Section 361-A:8 (1984); N.M. Stat. Ann. Section 56-8-11.1 (Supp. 1985); Or. Rev. Stat. Section 82-010 (1985); Utah Code Ann. Sections 15-1-1, 70C-2-101 (Supp. 1985); Va. Code Sections 6.1-330.37, 6.1-330.21 (1983); *id.* Sections 46.1-515 *et seq.* (1980 & Supp. 1985). In other States, there are no interest limits for certain types of loans. *E.g.*, Ala. Code Section 8-8-5 (1984); Alaska Stat. Section 45.45.010(b) (Supp. 1985) (no limit for loans over $25,000); Conn.. Gen.Stat. Ann. Section 37-9 (West Supp. 1985) (no limit for loans extended by certain financial institutions); Del. Code Ann. tit. 5, Section 2907 (Supp. 1985) (motor vehicle financing); Ill. Ann. Stat. ch. 17, Section 6404 (Smith-Hurd Supp. 1985); Ky. Rev. Stat. Ann. Section 360.150(2) and (13) (Bobbs-Merrill Supp. 1984); *id.* Section 360.010(1)(b); N.J. Stat. Ann. Section 17:16C-41 (West 1984); N.Y. Pers. Prop. Law Section 404(1) (McKinney Supp. 1986) (retail installment sales); Wyo. Stat. Section 40-14-212 (Supp. 1985) (no limit over $25,000); id. Section 40-14-348 (no limit over $25,000).

states have defenses available to lenders such as correcting technical violations in a contract before the borrower complains. The remedies available to purchasers or borrowers in some states are minor. Also, many consumers refinance or prepay their mobile home contracts leading to many of the debts on offending contract forms being no longer outstanding. Combining this with the fact that most finance companies used form contracts which qualified for preemption in those states where there was legislation to limit finance charges, it is a gross distortion and exaggeration for the finance companies to advance a "sky is falling" argument.[25]

CONCLUSION

While this case has enormous consequences for the families who have been overcharged in their mobile home transactions, it is not a paradigm with far reaching implications as petitioner suggests. It is a case in which the Court of Appeals has made a de-

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[25] Where mobile home financing contracts ended up as a part of GNMA pools, GNMA is protected by the obligation of the finance companies to repurchase and pay off any contracts which are for any reason defective. "Issuers [finance companies] are responsible for correcting any defects in pooled loans or buying the defective loans out of the pools at par.... If a mortgage is found to be defective after the four month period, the defect shall be promptly cured, or the loan shall be bought out at par, without the need to be replaced." Government National Mortgage Association, GNMA I, *Mortgage-Backed Securities Guide,* GNMA 5500.1, Rev. 6, p. 4-2. GNMA monitors the solvency of the issuers who place contracts into GNMA pools and requires an audited net worth for issuers dealing in mobile homes of "$500,000 plus 0.2 percent of such securities outstanding in excess of $35 million." *Id.* at 2-5.

cision that logically applies the override provisions in FHA/VA preemption consistent with the enactments of Congress when it passed the three preemption statutes during a six month period of the 96th Congress. The decision is consistent with the interpretation of the agency charged with responsibility for enforcing the FHA/VA housing programs. Moreover, when the argument now being made by the finance company was presented on its behalf to the Senate Banking Committee in 1985, it did not generate enough support to signal any concern from that body that the override provisions of FHA/VA were being misapplied.

The petition for a writ of certiorari in No. 87-383 should be denied.

Respectfully submitted,

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APPENDIX A

STATUTES AND REGULATIONS INVOLVED

The Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96-221, Title V, § 501, March 31, 1980, 94 Stat. 161, 12 USCA § 1735f-7 note, as amended by Pub. L. 96-399, Title III, §§ 308(c)(6), 324(a),(e), Oct. 8, 1980, 94 Stat. 1641, 1647, 1648; Pub. L. 97-35, Title III, § 384, Aug 13, 1981, 95 Stat. 432, provides that:

> (a) (1) The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is—
>
> (A) secured by a first lien on residential real property, by a first lien on all stock allocated to a dwelling unit in a residential cooperative housing corporation, or by a first lien on a residential manufactured home;
>
> (B) made after March 31, 1980; and
>
> (C) described in section 527(b) of the National Housing Act (12 U.S.C. 1735f-5(b)) [section 1735f-5(b) of this title], except that for the purpose of this section—
>
> (i) the limitation described in section 527(b)(1) of such Act [section 1735f-5(b)(1) of this title] that the property must be designed principally for the occupancy of from one to four families shall not apply;
>
> (ii) the requirement contained in section 527(b)(1) of such Act [section 1735f-5(b)(1) of this title] that the loan be secured by residential real property shall not apply to a loan secured by stock in a residential cooperative housing corporation nor to a loan or credit sale secured by a first lien on a residential manufactured home;

(iii)the term 'federally related mortgage loan' in section 527(b) of such Act [section 1735f-5(b) of this title] shall include a credit sale which is secured by a first lien on a residential manufactured home and which otherwise meets the definitional requirements of section 527(b) of such Act [section 1735f-5(b) of this title], as those requirements are modified by this section;

(iv) the term 'residential loans' in section 527(b)(2)(D) of such Act [section 1735f-5(b) (2)(D) of this title] shall also include loans or credit sales secured by a first lien on a residential manufactured home;

(v) the requirement contained in section 527(b)(2)(D) of such Act [section 1735f-5(b)(2)(D) of this title] that a creditor make or invest in loans aggregating more than $1,000,000 per year shall not apply to a creditor selling residential manufactured homes financed by loans or credit sales secured by first liens on residential manufactured homes if the creditor has an arrangement to sell such loans or credit sales in whole or in part, or if such loans or credit sales are sold in whole or in part to a lender, institution, or creditor described in section 527(b) of such Act [section 1735f-5(b) of this title] or in this section or a creditor, as defined in section 103(f) of the Truth in Lending Act [section 1602(f) of Title 15, Commerce and Trade], as such section was in effect on the day preceding the date of enactment of this title [Mar. 31, 1980], if such creditor makes or invests in residential real estate loans or loans or credit sales secured by first liens on residential manufactured homes aggregating more than $1,000,000 per year; and

(vi) the term 'lender' in section 527(b)(2)(A) of such Act [section 1735f-5(b)(2)(A) of this title] shall also be deemed to include any lender approved by the Secretary of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act [this chapter], and any individual who finances the sale or

exchange of residential real property or a residential manufactured home which such individual owns and which such individual occupies or has occupied as his principal residence.

(2) (A) The provisions of the constitution or law of any State expressly limiting the rate or amount of interest which may be charged, taken, received, or reserved shall not apply to any deposit or account held by, or other obligation of a depository institution. For purposes of this paragraph, the term 'depository institution' means—

(i) any insured bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) [section 1813 of this title];

(ii) any mutual savings bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) [section 1813 of this title];

(iii)any savings bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) [section 1813 of this title];

(iv) any insured credit union as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752) [section 1752 of this title];

(v) any member as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422) [section 1422 of this title]; and

(vi) any insured institution as defined in section 408 of the National Housing Act (12 U.S.C. 1730a) [section 1730a of this title].

(B) This paragraph shall not apply to any such deposit, account, or obligation which is payable only at an office of an insured bank, as defined in section 3 of the Federal Deposit Insurance Act [section 1813 of this title], located in the Commonwealth of Puerto Rico.

(b) (1) Except as provided in paragraphs (2) and (3), the provisions of subsection (a)(1) shall apply to any loan, mortgage, credit sale, or advance made in any State on or after April 1, 1980.

(2) Except as provided in paragraph (3), the provisions of subsection (a)(1) shall not apply to any loan, mortgage, credit sale, or advance made in any State after the date (on or after April 1, 1980, and before April 1, 1983) on which such State adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, which states explicitly and by its terms that such State does not want the provisions of subsection (a)(1) to apply with respect to loans, mortgages, credit sales, and advances made in such State.

(3) In any case in which a State takes an action described in paragraph (2), the provisions of subsection (a)(1) shall continue to apply to—

(A) any loan, mortgage, credit sale, or advance which is made after the date such action was taken pursuant to a commitment therefor which was entered during the period beginning on April 1, 1980, and ending on the date on which such States takes such action; and

(B) any loan, mortgage, or advance which is a rollover of a loan, mortgage, or advance, as described in regulations of the Federal Home Loan Bank Board, which was made or committed to be made during the period beginning on April 1, 1980, and ending on the date on which such State takes any action described in paragraph (2).

(4) At any time after the date of enactment of this Act [Mar. 31, 1980], any State may adopt a provision of law placing limitations on discount points or such other charges on any loan, mortgage, credit sale, or advance described in subsection (a)(1).

(c) The provisions of subsection (a)(1) shall not apply to a loan, mortgage, credit sale, or advance which is secured

by a first lien on a residential manufactured home unless the terms and conditions relating to such loan, mortgage, credit sale, or advance comply with consumer protection provisions specified in regulations prescribed by the Federal Home Loan Bank Board. Such regulations shall—

(1) include consumer protection provisions with respect to balloon payments, prepayment penalties, late charges and deferred fees;

(2) require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances);

(3) require that upon prepayment in full, the debtor shall be entitled to a refund of the unearned portion of the precomputed finance charge in an amount not less than the amount which would be calculated by the actuarial method, except that the debtor shall not be entitled to a refund which is less than $1; and

(4) include such other provisions as the Federal Home Loan Bank Board may prescribe after a finding that additional protections are required.

(d) The provisions of subsection (c) shall not apply to a loan, mortgage, credit sale, or advance secured by a first lien on a residential manufactured home until regulations required to be issued pursuant to paragraphs (1), (2), and (3) of subsection (c) take effect, except that the provisions of subsection (c) shall apply in the case of such a loan, mortgage, credit sale, or advance made prior to the date on which such regulations take effect if the loan, mortgage, credit sale, or advance includes a precomputed finance charge and does not provide that, upon prepayment in full, the refund of the unearned portion of the precomputed finance charge is in an amount not less the amount which would be calculated by the actuarial method, except that the debtor shall not be entitled to a refund which is

less than $1. The Federal Home Loan Bank Board shall issue regulations pursuant to the provisions of paragraphs (1), (2), and (3) of subsection (c) that shall take effect prospectively not less than 30 days after publication in the Federal Register and not later than 120 days from the date of enactment of this Act [Mar. 31, 1980].

(e) For the purpose of this section—

(1) a 'prepayment' occurs upon—

(A) the refinancing or consolidation of the indebtedness;

(B) the actual prepayment of the indebtedness by the consumer whether voluntarily or following acceleration of the payment obligation by the creditor; or

(C) the entry of a judgment for the indebtedness in favor of the creditor;

(2) the term 'actuarial method' means the method of allocating payments made on a debt between the outstanding balance of the obligation and the precomputed finance charge pursuant to which a payment is applied first to the accrued precomputed finance charge and any remainder is subtracted from, or any deficiency is added to, the outstanding balance of the obligation;

(3) the term 'precomputed finance charge' means interest or a time price differential within the meaning of sections 106(a)(1) and (2) of the Truth in Lending Act (15 U.S.C. 1605(a)(1) and (2) [section 1605(a)(1) and (2) of Title 15, Commerce and Trade] as computed by an add-on or discount method; and

(4) the term 'residential manufactured home' means a manufactured home as defined in section 603(6) of the National Mobile Home Construction and Safety Standards Act of 1974 [now the National Manufactured Housing Construction and Safety Standards Act of 1974 (section 5402(6) of Title 42, The Public Health and Welfare)] which is used as a residence.

(f) The Federal Home Loan Bank Board is authorized to issue rules and regulations and to publish interpretations governing the implementation of this section.

(g) This section takes effect on April 1, 1980.

OCGA § 10-1-33(a) provides in pertinent part that:

(a) Notwithstanding any other law, the finance charge, exclusive of insurance and other benefits and official fees, shall not exceed the following rates:

Class 1. Any new motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made and all vehicles not previously titled — $10.00 per $100.00. per year.

OCGA § 10-1-38(b)(c) provides in pertinent part that:

(b) A violation of Code Section 10-1-33 by the seller or holder shall bar recovery of any finance charge, delinquency, or collection charge on the contract.

(c) In case of a willful violation of this article with respect to any transaction, the buyer in such transaction may recover from the person committing the violation (or may set off or counterclaim in any action by such person) a minimum of $100.00 or double the time price differential and any delinquency charge and any attorneys' fees and court costs charged and paid with respect to such transaction, but the seller may recover from the buyer an amount equal to the cash price of the goods or services in such transaction and the cost of any insurance purchased by the seller for the buyer in connection therewith.

REGULATIONS

45 Fed. Reg. 31122 (May 12, 1980) (proposed May 5, 1980) provides in pertinent part:

SUPPLEMENTARY INFORMATION:

Background

The Federal Home Loan Bank Board is proposing amendments to its regulations in 12 CFR 590.4 on the

preemption of state usury ceilings on mobile home loans (*see* 45 FR 24112, April 9, 1980). At present, these regulations, which implement section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("Act"), Pub.L. 96-221, 94 Stat. 161, provide that interest rates on mobile home loans made by any covered lender after March 31, 1980, may exceed state usury ceilings if, in the event of prepayment, unearned precomputed finance charges on the outstanding loan balance are refunded to the borrower in an amount not less than that computed by the actuarial method.

The Act provides that the actuarial rebate will be the only limitation on the usury preemption with respect to mobile home loans until the Board adopts regulations requiring more extensive protections for the mobile home buyer. Once the Board adopts such regulatory provisions (which must be effective by July 30, 1980), state usury ceilings may be exceeded by a lender covered by the Act only if the loan complies with such regulations. A mobile home loan not complying with the regulations would be open to attack under state usury laws.

45 Fed. Reg. 43681 (June 30, 1980) provides in pertinent part that:

SUMMARY: The rules prescribe consumer protections which must be included in loans secured by first liens on mobile homes before such loans are eligible for the state usury law exemption contained in section 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 and implementing regulations (12 C.F.R. Part 590).

45 Fed. Reg. 43681, 43682 (June 30, 1980) provides in pertinent part that:

DISCUSSION OF FINAL AMENDMENTS

Applicability. These regulations apply only when a creditor covered by the Act chooses to charge an interest rate which exceeds the state's usury limit on mobile home loans.

12 C.F.R. § 590.4 provides that:

§ 590.4 Consumer protection rules for federally-related loans, mortgages, credit sales and advances secured by first liens on residential mobile homes.

(a) *Definitions.* As used in this section:

(1) *Prepayment.* A 'prepayment' occurs upon—

(i) Refinancing or consolidation of the indebtedness;

(ii) Actual prepayment of the indebtedness by the debtor, whether voluntarily or following acceleration of the payment obligation by the creditor; or

(iii)The entry of a judgment for the indebtedness in favor of the creditor.

(2) *Actuarial method.* The term 'actuarial method' means the method of allocating payments made on a debt between the outstanding balance of the obligation and the finance charge pursuant to which a payment is applied first to the accumulated finance charge and any remainder is subtracted from, or any deficiency is added to, the outstanding balance of the obligation.

(3) *Precomputed Finance Charge.* The term 'precomputed finance charge' means interest or a time/price differential as computed by the add-on or discount method. Precomputed finance charges do not include loan fees, points, finder's fees, or similar charges.

(4) *Creditor.* The term 'creditor' means any entity covered by this Part, including those which regularly extend or arrange for the extension of credit and assignees that are creditors under section 501(a)(1)(C)(v) of the Depository Institutions Deregulation and Monetary Control Act of 1980.

(b) *General.*

(1) The provisions of the Constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is secured by a first lien on a residential mobile home if a creditor covered by this Part complies with the consumer protection regulations of this section.

(2) *Relation to State Law.*

(i) In making loans or credit sales subject to this section, creditors shall comply with state and Federal law in accordance with the following:

(A) *State law regulating matters not covered by this section.* When state law regulating matters not covered by this section is otherwise applicable to a loan or credit sale subject to this section, creditors shall comply with such state law provisions.

(B) *State law regulating matters covered by this section.* Creditors need comply only with the provisions of this section, unless the Board determines that an otherwise applicable state law regulating matters covered by this section provides greater protection to consumers. Such determinations shall be published in the FEDERAL REGISTER and shall operate prospectively.

(ii) Any interested party may petition the Board for a determination that state law requirements are more protective of consumers that the provisions of this section. Petitions shall be sent to: Secretary to the Board, Federal Home Loan Bank Board, 1700 G Street, NW., Washington, D.C. 20552, and shall include:

(A) A copy of the state law to be considered;

(B) Copies of any relevant judicial, regulatory, or administrative interpretations of the state law; and

(C) An opinion or memorandum from the state Attorney General or other appropriate state official having primary enforcement responsibilities for the subject state law provisions, indicating how the state law to be considered offers greater protection to consumers that the Board's regulation.

(c) *Refund of precomputed finance charge.* In the event the entire indebtedness is prepaid, the unearned portion of the precomputed finance charge shall be refunded to the debtor. This refund shall be in an amount not less than the amount which would be refunded if the unearned precomputed finance charge were calculated in accordance with the actuarial method, except that the debtor shall not be entitled to a refund which is less than one dollar. The unearned portion of the precomputed finance charge is, at the option of the creditor, either:

(1) That portion of the precomputed finance charge which is allocable to all unexpired payment periods as originally scheduled, or if deferred, as deferred. A payment period shall be deemed unexpired if prepayment is made within 15 days after the payment period's scheduled due date. The unearned precomputed finance charge is the total of that which would have been earned for each such period had the loan not been precomputed, by applying to unpaid balances of principal, according to the actuarial method, an annual percentage rate based on those charges which are considered precomputed finance charges in this section, assuming that all payments were made as originally scheduled, or as deferred, if deferred. The creditor, at its option, may round this annual percentage rate to the nearest one-quarter of one percent; or

(2) The total precomputed finance charge less the earned precomputed finance charge. The earned precomputed finance charge shall be determined by applying an annual percentage rate based on the total precomputed finance charge (as that term is defined in this section),

under the actuarial method, to the unpaid balances for the actual time those balances were unpaid up to the date of prepayment. If a late charge or deferral fee has been collected, it shall be treated as a payment.

(d) *Prepayment penalties.* A debtor may prepay in full or in part the unpaid balance of the loan at any time without penalty. The right to prepay shall be disclosed in the loan contract in type larger than that used for the body of the document.

(e) *Balloon payments—*

(1) *Federal associations.* Federal association creditors may enter into agreements with debtors which provide for non-amortized and partially-amortized loans on residential manufactured homes, and such loans shall be governed by the provisions of this section and § 545.33(f) of this chapter.

(2) *Other creditors.* All other creditors may enter into agreements with debtors which provide for non-amortized and partially-amortized loans on residential manufactured homes to the extent authorized by applicable Federal or state law or regulation.

(f) *Late charges.*

(1) No late charge may be assessed, imposed, or collected unless provided for by written contract between the creditor and debtor.

(2) To the extent that applicable State law does not provide for a longer period of time, no late charge may be collected on an installment which is paid in full on or before the 15th day after its scheduled or deferred due date even though an earlier maturing installment or a late charge on an earlier installment may not have been paid in full. For purposes of assessing late charges, payments received are deemed to be applied first to current installments.

(3) A late charge may be imposed only once on an installment; however, no such charge may be collected for a late installment which has been deferred.

(4) To the extent that applicable State law does not provide for a lower charge or longer grace period, a late charge on any installment not paid in full on or before the 15th day after its scheduled or deferred due date may not exceed the lesser of $5.00 or five percent of the unpaid amount of the installment.

(5) If, at any time after imposition of a late charge, the lender provides the borrower with written notice regarding amounts claimed to be due but unpaid, the notice shall separately state the total of all late charges claimed.

(6) Interest after the final scheduled maturity date may not exceed the maximum rate otherwise allowable under State law for such contracts, and if such interest is charged, no separate late charge may be made on the final scheduled installment.

(g) *Deferral fees.*

(1) With respect to mobile home credit transactions containing precomputed finance charges, agreements providing for deferral of all or part of one or more installments shall be in writing, signed by the parties, and

(i) Provide, to the extent that applicable state law does not provide for a lower charge, for a charge not exceeding one percent of each installment or part thereof for each month from the date when such installment was due to the date when it is agreed to become payable and proportionately for a part of each month, counting each day as 1/30th of a month;

(ii) Incorporate by reference the transaction to which the deferral applied;

(iii)Disclose each installment or part thereof in the amount to be deferred, the date or dates originally payable, and the date or dates agreed to become payable; and

(iv) Set forth the fact of the deferral charge, the dollar amount of the charge for each installment to be deferred, and the total dollar amount to be paid by the debtor for the privilege of deferring payment.

(2) No term of a writing executed by the debtor shall constitute authority for a creditor unilaterally to grant a deferral with respect to which a charge is to be imposed or collected.

(3) The deferral period is that period of time in which no payment is required or made by reason of the deferral.

(4) Payments received with respect to deferred installments shall be deemed to be applied first to deferred installments.

(5) A charge may not be collected for the deferral of an installment or any part thereof if, with respect to that installment, a refinancing or consolidation agreement is concluded by the parties, or a late charge has been imposed or collected, unless such late charge is refunded to the borrower or credited to the deferral charge.

(h) *Notice before repossession, foreclosure, or acceleration.*

(1) Except in the case of abandonment or other extreme circumstances, no action to repossess or foreclose, or to accelerate payment of the entire outsanding balance of the obligation, may be taken against the debtor until 30 days after the creditor sends the debtor a notice of default in the form set forth in paragraph (h)(2) of this section. Such notice shall be sent by registered or certified mail with return receipt requested. In the case of default on payments, the sum stated in the notice may only include payments in default and applicable late or deferral charges. If the debtor cures the default within 30 days of the postmark of the notice and subsequently defaults a second time, the creditor shall again give notice as de-

scribed above. The debtor is not entitled to notice of default more than twice in any one-year period.

(2) The notice in the following form shall state the nature of the default, the action the debtor must take to cure the default, the creditor's intended actions upon failure of the debtor to cure the default, and the debtor's right to redeem under state law.

TO: _____

DATE: _____, 19____

NOTICE OF DEFAULT AND RIGHT TO CURE DEFAULT

Name, address, and telephone number of creditor _____

_____

Account number, if any _____

Brief identification of credit transaction _____

_____

You are now in default on this credit transaction. You have a right to correct this default within 30 days from the postmarked date of this notice.

If you correct the default, you may continue with the contract as though you did not default. You default consists of: _____ Describe default alleged _____

Cure of default: Within 30 days from the postmarked date of this notice, you may cure your default by (describe the acts necessary for cure, including, if applicable, the amount of payment required, including itemized delinquency or deferral charges).

_____

_____

Creditor's rights: If you do not correct your default in the time allowed, we may exercise our rights against you under the law by (describe action creditor intends to take).

If you have any questions, write (the creditor) _____ at the above address or call (creditor's designated employee) _____ at (telephone number) _____ between the hours of _____ and _____ on (state days of week) _____.

If this default was caused by your failure to make a payment or payments, and you want to pay by mail, please send a check or money order; do not send cash.

APPENDIX B

GEORGIA RETAIL INSTALLMENT CONTRACT
SECURITY AGREEMENT
FEDERAL CONSUMER CREDIT DISCLOSURES

FORT WAYNE MORTGAGE CO.

Date NOV. 26TH, 19 82

Buyer (which means the undersigned Buyers and Co-Buyers, jointly and severally, hereinafter referred to as Buyer, you or your) having been quoted both a Time Price and a lesser Cash Price, hereby purchases from Seller on a time price basis, upon the terms and conditions set forth on the face and reverse sides hereof, the manufactured home described as follows:

New or Used	Year	Make or Trade Name	Model	Manufacturer's Serial Number
NEW	83	SHOWCASE		SHS1WGA25621079

together with all other furnishings, accessories, equipment, tools and parts now attached to or installed in the manufactured home.

The manufactured home is now, or shall be kept at

2100 BURKE STREET Street, City of WAYCROSS, County of WARE, State of GA Zip Code 31501

Seller-Creditor-Name and Address

Showcase Homes
1900 Memorial Drive
Waycross, Ga. 31501

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	Amount Financed	Total of Payments	Total Sale Price
The cost of your credit as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The amount you will have paid after you have made all payments as scheduled.	The total cost of your purchase on credit, including your down payment of $ 2000.00
15.00%	$ 22489.98	$ 14751.02	$ 37161.00	$ 39210.00

Your payment schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due
180	$ 206.45	Monthly beginning DECEMBER 2119 82

INSURANCE: You may obtain property insurance from anyone you want that is acceptable to Seller. If you get the insurance from or through Seller, you will pay $ .00e for a term of 0 months.

SECURITY: You are giving a security interest in the goods or property being purchased.

FILING FEES: $ 6.50

LATE CHARGE: If a payment is late, you will be charged $ .00 or %
of the payment, whichever is less.

PREPAYMENT: If you pay off early, you may be entitled to a refund of part of the finance charge.

ASSUMPTION: Someone buying your manufactured home may, subject to conditions, be allowed to assume the remainder of the contract on the original terms.

See the Retail Installment Contract for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

e means an estimate

Itemization of the Amount Financed of $ 18751.02

$ 14893.52 Amount paid on your account.

Amount paid to others on your behalf:

$ 6.50 to public officials

$ .00e to insurance company

$ N/A to

$ 14.00 Prepaid finance charge

Buyer shall pay to Seller, or order, the Total of Payments at the address of Seller stated above or at such other place as the Seller shall designate in writing in equal consecutive monthly installments on the first day of each month in the number and amount and commencing on the date set forth in the payment schedule. In addition, the initial installment payment of the insurance premium shall be $ 24.82

WARNING: LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED UNLESS THE BOX BELOW IS CHECKED.

☐ Liability insurance coverage for bodily injury and property damage caused to others is included in Buyer's insurance policy.

NOTICE TO THE BUYER

DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES. YOU ARE ENTITLED TO AN EXACT COPY OF THE CONTRACT YOU SIGN.

17a

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

It is understood that Seller may assign this Contract to Fort Wayne Mortgage Co. but the assignment shall not be deemed to be accepted until Seller has received the proceeds of the sale of this Contract. The foregoing Contract is accepted by Seller and assigned in accordance with the terms of the Assignment set forth on the reverse side hereof.

Seller Jimmy Jacobs DBA Showcase Mobile Homes By Jimmy Jacobs Title Owner

BUYER ACKNOWLEDGES RECEIPT OF A COMPLETED COPY OF THIS RETAIL INSTALLMENT CONTRACT, INCLUDING THE ADDITIONAL TERMS AND CONDITIONS ON THE REVERSE SIDE, PRIOR TO THE CONSUMMATION OF THE TRANSACTION.

X *BUYER

X *CO BUYER

*CO BUYER

ADDRESS (Street) (City) (County) (State) (Zip)

*Type or print name beneath signature

SEE REVERSE SIDE

Fort Wayne Mortgage Co. Copyright (C) 1982

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ADDITIONAL TERMS AND CONDITIONS

1. In order to secure payment of the Total of Payments, Buyer grants to Seller a security interest pursuant to the Uniform Commercial Code in the following: (i) the manufactured home, furnishings, accessories, equipment, tools and parts which Buyer purchases from Seller pursuant to this Contract; (ii) accessions to the manufactured home, furnishings, accessories, equipment, tools and parts; (iii) the proceeds of such manufactured home, furnishings, accessories, equipment, tools, parts and accessions, including, but not limited to, the proceeds of insurance policies pertaining thereto; (iv) all furnishings, accessories, equipment, tools and parts attached to, installed in, or used in connection with the manufactured home and acquired by the Buyer within ten (10) days after Buyer acquires the manufactured home; and (v) any unearned insurance premiums refunded upon cancellation of the insurance which Buyer is obligated to furnish under this Contract (hereinafter referred to as "Collateral"). In order to secure payment of the Total of Payments, Buyer also grants to Seller the right to apply any funds held in escrow for payment of insurance premiums to the payment of the indebtedness evidenced hereby upon default by Buyer.

2. In the event Buyer applied for a contract insured by the Federal Housing Administration and an installment is not paid in full within 10 days after its scheduled due date or in the event Buyer applied for a contract guaranteed by the Veteran's Administration and an installment is not paid in full within 15 days after its scheduled due date, Buyer shall pay a late charge in the amount set forth on the face hereof. If this Contract is referred for collection to an attorney not a salaried employee of Seller, to the extent permitted by law Buyer shall pay reasonable attorney's fees plus court costs incurred by Seller. To the extent permitted by law, Buyer shall pay the reasonable expenses incurred by Seller in realizing upon the security interest granted herein.

3. Buyer may prepay in full the indebtedness evidenced by this Contract at any time prior to the maturity of the final installment hereunder. If Buyer so prepays the indebtedness, whether voluntarily or involuntarily, Buyer shall receive a rebate of the unearned portion of the Finance Charge, excluding the Prepaid finance charge, if any, calculated in accordance with the actuarial method using the rate by which the Finance Charge, excluding the Prepaid finance charge, was originally calculated. The Prepaid finance charge shall be earned upon payment. No rebate will be made if the amount thereof is less than $1.00.

4. Buyer represents and warrants that, except for the security interest granted hereby, the Collateral is free and clear of all liens, claims and encumbrances whatsoever, that Buyer has full right and power to grant a security interest therein to Seller, and that the certificate of title thereto is or is about to be registered in Buyer's name. Buyer represents that no financing statement executed by Buyer covering the Collateral, other than a financing statement relating hereto, is on file in any public office. Buyer represents and warrants that the manufactured home shall be used solely as the principal residence of Buyer. Buyer represents and warrants that the manufactured home shall remain personal property and shall not be deemed to be a fixture or a part of the real property on which it is situated, notwithstanding the manner by which it is affixed to the real property.

5. Buyer shall comply with, and shall not permit any violation of, all laws, ordinances, regulations and orders of all public authorities relating to the Collateral. Buyer shall keep and maintain the Collateral in good repair and in a safe condition, shall not permit any lien or encumbrance at any time to accrue thereon, and shall keep the same insured against physical damage, including flood, and theft in an amount not less than the amount of the indebtedness evidenced hereby with such insurers as Seller may, to the extent permitted by law, from time to time approve and shall deliver the policies therefor to Seller, together with receipts evidencing payment in full of the premium thereon, the proceeds of such policies to be payable to Seller and to be applied by Seller, as and when received, to the payment of the indebtedness secured hereby, whether or not then due, or, at Seller's option, to the repair or replacement of the Collateral. If Buyer has authorized Seller to purchase such insurance, the cost thereof is set forth at Item 5 on the face of this Contract. In the event that Buyer shall fail to perform any of Buyer's obligations hereunder, Seller, at its option, may perform the same and all amounts so expended by Seller shall be payable by Buyer to Seller forthwith with interest thereon at the highest rate permitted by law. In the event of any such advances, Seller may apply amounts received to the Total of Payments or to such advances as Seller, in its sole discretion, shall determine.

6. Buyer shall pay to Seller at the times provided herein for installment payments of the Total of Payments, installments of the premiums that will become due and payable in the future to renew the insurance required under paragraph 5 hereof, said installments to be substantially equal and to be in such amounts as will assure to Seller that, not less than thirty (30) days before the time when such premiums become due, Buyer will have paid to Seller a sufficient amount to pay such premiums in full. Such installment payments of insurance premiums need not be segregated or kept in a separate fund and no interest shall be payable thereon. Said amounts shall be applied to the payment of the insurance premiums when the same become due and payable; provided, however, that Seller shall have no liability for any failure to so apply said amounts for any reason whatsoever. Nothing contained herein shall in any manner limit the obligation of Buyer to maintain insurance as above provided. In the event of default by Buyer, Seller may, at its option, but without any obligation on its part so to do, apply said amounts to the payment of the insurance premiums and/or toward payment of any amounts payable by Buyer to Seller under this Contract, whether or not the same are then due and payable.

7. Buyer shall keep the Collateral at the address stated on the face hereof. Buyer shall not sell, encumber or transfer the Collateral, or any part thereof, or remove the Collateral, or any part thereof, from such location or this State, or attempt any such sale, encumbering, transfer or removal, without the prior written consent of Seller. Seller shall be entitled to inspect the Collateral at all reasonable times.

8. Upon the happening of any of the following events or conditions: (a) default in the payment of the indebtedness evidenced by this Contract or the rent for the property on which the manufactured home is situated or in the performance of any of the obligations of Buyer under this Contract; (b) any warranty, representation or statement made or furnished to Seller by or on behalf of Buyer in connection with this Contract proving to have been false or breached in any material respect; (c) loss, theft, damage, destruction, sale or encumbrance of the Collateral, or the making of any levy, seizure or attachment thereof or thereon; (d) insolvency, appointment of a receiver for Buyer, or assignment for the benefit of creditors by Buyer, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Buyer, thereupon, or at any time thereafter (such default not having previously been cured) Seller, at its option, may declare said indebtedness to be immediately due and payable and Seller shall have the remedies of a secured party under the Uniform Commercial Code, including without limitation, the right to take possession of the Collateral by any lawful means and to sell the same and for that purpose Seller may enter upon any premises on which the Collateral may be situated and remove the same to such other place as Seller shall determine. After taking possession of the Collateral, Seller may dispose of the same by transferring the Collateral to a person who assumes the obligation of Buyer hereunder or acquires the Collateral subject to such obligations. Such a transfer shall be deemed to be a disposition of the Collateral by private proceedings in accordance with the Uniform Commercial Code and the security interest and terms of this Contract shall continue in full force and effect as to such person. Upon demand by Seller, Buyer shall make the Collateral available to Seller at a place to be designated by Seller which is reasonably convenient to both parties. Any requirement of notice under the Uniform Commercial Code shall be met if such notice is mailed, postage prepaid, to the address where the manufactured home shall be kept specified on the face hereof at least five (5) days before the event with respect to which notice is required. Upon acceleration of the indebtedness, all amounts then or thereafter lawfully due shall bear interest at the highest rate permitted by law.

9. NO REPRESENTATION, PROMISE OR WARRANTY, EXPRESS OR IMPLIED, HAS BEEN MADE WITH RESPECT TO THE MERCHANTABILITY, SUITABILITY OR FITNESS FOR PURPOSE OF THE COLLATERAL, OR OTHERWISE unless the same is contained in a separate written instrument delivered to Buyer on or before the date upon which possession of the Collateral is delivered to Buyer.

10. Time shall be of the essence hereof. The waiver by Seller of any default shall not be deemed a waiver of any other default or any subsequent default. Upon acceptance of the assignment of this Contract, any reference herein to Seller shall include the successors and assigns of Seller. In the event Buyer shall consist of more than one person, their obligations and liability hereunder shall be joint and several. The Federal Consumer Credit Disclosures set forth on the face of this Contract are incorporated in, and made a part of, this Contract.

ASSIGNMENT

Seller assigns to Fort Wayne Mortgage Co., its successors and assigns (Assignee), the foregoing Contract including, but not limited to, all amounts payable by Buyer and the security interest in the Collateral, together with all contracts, claims, actions or causes of action which Seller may have against anyone, including but not limited to the manufacturer of the manufactured home and the Buyer, which in any manner arise out of the purchase of the manufactured home from the manufacturer or the sale thereof to the Buyer. Seller represents and warrants that the foregoing Contract is genuine, that the statements and amounts inserted are correct, that the Buyer had legal capacity to execute the same and is liable thereon, that the Collateral has been sold and possession delivered to and accepted by Buyer on the date Buyer signed FHA Form FH-2 (MH) or VA Form VA26-8644, whichever is applicable, that application for statutory certificate of title in the name of the Buyer stating the name and address of Assignee as the holder of the only security interest in the Collateral has been filed, that the Collateral is free and clear of all liens and encumbrances except the security interest granted by this Contract, that the security interest granted to Seller is a valid first lien on the property described in this Contract, that the full amount of the stated Total of Payments remains unpaid, that there are no setoffs or counterclaims thereto, that Seller is the holder of the Contract and the security interest in the Collateral, free and clear of all liens and encumbrances and that Seller has full power and authority to assign the same, that the transaction was consummated on the above date set forth in the Contract, that the Buyer did not receive possession of the Collateral prior to the date of consummation, that the Buyer was furnished with a completed copy of the Contract prior to consummation, that the Buyer has property insurance in the amount of the indebtedness and that Seller has obtained all licenses and certificates required to cause the sale and the Contract to be enforceable.

If there shall be a claim by Buyer of breach of any of Seller's warranties to Buyer, including, but not limited to, a claim of defects in the manufactured home, or a breach of any of Seller's warranties to Assignee, without regard to Seller's knowledge or lack of knowledge of such breach or Buyer's or Assignee's reliance on such warranty or Buyer asserts against Assignee a defense, setoff, claim or counterclaim based on any alleged act, omission or default by Seller with respect to the Contract or the Collateral, Seller hereby agrees unconditionally to: (i) repurchase said Contract upon demand from Assignee for the then unpaid obligation on said Contract whether or not said Contract shall be in default; and (ii) indemnify and hold Assignee harmless from all claims or counterclaims asserted against Assignee by Buyer arising out of any act, omission or default of Seller. The liability of Seller arising out of this Assignment shall not be affected by any indulgence, compromise, settlement, extension or variation of terms of said Contract. In addition, if signed below, this Assignment includes the provisions of the paragraph set forth below.

Limited Repurchase-If Buyer defaults in the payment of any of the first 3 installments when due, Seller shall repurchase the foregoing Contract for the then unpaid balance of the indebtedness.

Jimmy Jacobs DBA
Showcase Mobile Homes

By Jimmy Jacobs

November 8th, 1982 Its Owner

Fort Wayne Mortgage Co. assigns to _____, its successors and assigns, the foregoing Contract including all amounts payable by Buyer and the security interest in the Collateral, without recourse.

Fort Wayne Mortgage Co.

By _____

_____, 19____ Its _____

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